SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 223

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SWIFT & COMPANY, APPELLANTS

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

INDEX

	Original	Print
Record from D. C. U. S., Northern District of Ohio	1	1
Caption [omitted in printing]	1	1
Motion for preliminary injunction in Civil No. 24435	2	1
Affidavit of R. R. Pierce	4	2
Complaint in Civil No. 24435	7	4
Exhibit "A"—Report of Commission in Docket No. 28714, May 3, 1946	40	28
Exhibit "B–1"—Order of Commission, July 25, 1946, postponing effective date of order of May 3, 1946	63	50
Exhibit "B–2"—Order of Commission, Oct. 17, 1946, postponing effective date of order of May 3, 1946	64	51
Exhibit "B–3"—Order of Commission, Nov. 13, 1946, shortening notice required by order of Oct. 17, 1946	65	51
Exhibit "C"—Plat showing real estate transfers in vicinity of Cleveland Union Stock Yards Co., Oct. 30, 1941	66	Face 52
Exhibit "D"—Supplemental agreement to sidetrack agreement dated June 16, 1924—New York Central R. R. Co. and The Cleveland Union Stock Yards Co.	67	52
Exhibit "E"—Letter, The Cleveland Union Stock Yards Co. to New York Central R. R. Co., Nov. 15, 1946	70	54
Answer of United States in Civil No. 24435	73	57

Record from D. C. U. S., Northern District of Ohio—Con.	Original	Print
Answer of Interstate Commerce Commission in Civil No. 24435	75	58
Exhibit No. 1—Order of Commission in Docket No. 28714, May 3, 1946	88	65
Answer of Swift & Company in Civil No. 24435	89	66
Exhibit "A"—W. S. Curlett's tariff I. C. C. No. A-833	97	72
Order of Court, dated January 2, 1947, assembling a three-judge court	109	85
Motion for preliminary injunction in Civil No. 24479	110	86
Affidavit of M. S. Farmer	111	87
Complaint in Civil No. 24479	114	88
Order of Court, dated February 25, 1947, consolidating the two cases	127	96
Answer of United States in Civil No. 24479	128	96
Answer of Interstate Commerce Commission in Civil No. 24479	130	97
Petition of Swift & Company for leave to intervene in Civil No. 24479, and order granting same	140-A	104
Answer of Swift & Company in Civil No. 24479	141	104
Minutes of hearing held before three-judge court at Cleveland, Ohio, on February 25, 1947	147	107
Caption and appearances	147	108
Argument of—		
Mr. Farmer	155, 208	137
Mr. Pierce	172, 220	143
Mr. Reidy	182	124
Mr. Ryder	200	133
Submission of case	228	147
Opinion of court, Jones, J	229	148
Plaintiff's suggested findings of fact and conclusions of law	235	153
Findings of fact, conclusions of law and decree suggested by defendants, United States, Interstate Commerce Commission and Swift & Company	254	165
Letter of defendants to United States Attorney Miller, dated April 11, 1947, transmitting defendants' suggested findings and conclusions and objecting to findings and conclusions suggested by plaintiffs	264	170
Plaintiffs' memorandum of objections and exceptions to defendants' suggested findings and conclusions	266	173
Findings of fact and conclusions of law entered by court on May 9, 1947	274	178
Final order and judgment dated May 14, 1947	288	190
Petition for appeal	289	191
Order allowing appeal	291	192
Citation on appeal [omitted in printing]	292	192
Notice of appeal to Attorney General of Ohio	293	192
Assignment of errors	296	194
Order as to exhibits	305	199
Praecipe for transcript of record	307	200
Clerk's certificate [omitted in printing]	311	

	Original	Print
Proceedings before Interstate Commerce Commission in Docket No. 28714	314	202
Reporter's transcript of hearings held April 22, 1942, and June 22, 1944	314	203
Caption and appearances, April 22, 1942	314	203
Testimony of—		
G. F. Tally	319	205
J. H. Hurley	357	226
Stipulations as to certain facts	368	232
Caption and appearances, June 22, 1944	375	235
Testimony of—		
Gilbert F. Ford	386	239
A. B. Pastor	436	267
Richard C. Cobbe	444	272
L. N. Shaner	461	281
Richard C. Cobbe (recalled)	486	295
A. Z. Baker	488	296
Gilbert F. Ford (recalled)	503	305
Exhibits:		
1—Map showing Cleveland Union Stock Yard and 1619 feet of New York Central spur track, etc	512	310
2—Photostatic copy of tariff of the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.	513	310
3—Photostatic copy of tariff of the New York Central R. R. Co	515	314
4—Photostatic copy of letter dated August 14, 1941, from Swift & Co. to C. J. Brister, V. P., Freight Traffic, N. Y. C. System, et al	517	317
5—Photostatic copy of letter dated September 27, 1941 from C. J. Brister, N. Y. C. System, et al. to W. A. Mayfield, Swift & Co.	518	318
6—Photostatic copy of bill of lading or livestock contract dated September 24, 1941, signed by N. Y. C. R. Co. for carload shipment of sheep to Swift & Co. at Cleveland, O.	519	319
7—Reproduction of Appendix I, II, and III of I. C. C.'s decision in Ex Parte 127, consisting of letters between the Livestock Terminal Service Company and the New York Central Railroad Company. Also copy of an agreement between the Cleveland Union Stock Yards Company and Livestock Terminal Service Company	520	321
8—Reproduction of Exhibit 312 filed in Ex Parte 127, covering a lease agreement between the Cleveland Union Stock Yards Company and Livestock Terminal Service Company	533	333

Proceedings before Interstate Commerce Commission in Docket No. 28714—Continued
Reporter's transcript of hearings held April 22, 1942, and June 22, 1944—Continued
Exhibits—Continued

	Original	Print
9—Four pages of an agreement, dated June 16, 1924, effective February 1, 1925, between the Cleveland, Cincinnati, Chicago & St. Louis Ry, Co. and the Cleveland Union Stock Yards Company	541	338
10—Chronological statement of switching charges and reciprocal switching at Cleveland, O., on the C., C., C. & St. L. Ry. Co. (N. Y. C. R. R. lessee) pp. 2, 3, and 4. Also listing of packing houses appearing in C., C., C. & St. L. Ry. Co. current tariff, p. 5	546	342
11—A "Stipulation" purporting to be a memorandum of some documents from New York Central's file	551	343
11-A—A map accompanying Ex. No. 11 showing proposed switch from Stock Yards switch crossing Gordon Ave. and Peoples Packing Co. property south of present buildings. Track about 373 ft. long	558	343
11-B, 11-C, 11-D—Letters from Swift & Co. to Traffic Mgr. Ingalls, New York Central Lines attached to Exhibit 11-A	555	346
14—Agreement, dated May 10, 1899, between the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and The Cleveland Stock Yards Co. for the construction of two side tracks at Cleveland, O	559	347
15—Side Track agreement, dated March 17, 1938, between the New York Central R. R. Co., lessee of the Cleveland, Cincinnati, Chicago & St. Louis Ry., The Standard Beef Co. and the Cleveland Union Stock Yards Co	562	350
16—Side Track agreement, dated August 1, 1927, between C., C., C. and St. L. Ry. Co., Kallem Kreinberg and William A. Krasny, d. b. a. Kreinberg & Krasny, and the Cleveland Union Stock Yards Co.; assignment of agreement, dated July 7, 1943, * * * to Kreinberg and Krasny, Inc.; and Application and Consent, dated July 7, 1943, to permit use of said track by the U. S. Coast Guard, Commissary Supply Depot and consent of The N. Y. C. R. R. Co. to such use of track	574	356

Proceedings before Interstate Commerce Commission in Docket No. 28714—Continued
Reporter's transcript of hearings held April 22, 1942, and June 22, 1944—Continued
Exhibits—Continued

	Original	Print
17—Side Track agreement, dated October 1, 1937, between the New York Central R. R. Co., lessee of the C. C. C. & St. L. Ry. Co., Earl C. Gibbs, Inc. and The Cleveland Union Stock Yards Co.; Application and Consent, dated March 16, 1939, permitting use of said track by Hansol Packing Co.; same dated November 6, 1939, permitting use by Hygrade Food Products Corp.; mutual consent form, dated May 7, 1940, terminating Application and Consent dated March 16, 1939, and Application and Consent permitting use by Cleveland Provision Co	588	
18—Agreement, dated November 25, 1916, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and Swift & Company	609	374
18—A—Blueprint showing tracks covered by agreement, Exhibit No. 18	617	Face 378
19—Agreement, dated October 27, 1910, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and Henry C. Thom, d. b. a. Peoples Packing Co. of Cleveland, O	618	378
20—Side Track agreement, dated May 25, 1912, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and Henry G. Thom, d. b. a. Peoples Packing Co	622	380
21—Side Track agreement dated March 28, 1927, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and Federal Packing Co., and letter dated May 5, 1931, indicating March 28, 1927, agreement superseded by agreement, dated November 24, 1930	628	383
22—Side Track agreement, dated November 24, 1930, between The New York Central R. R. Co., and the Federal Packing Co.; and assignment by Federal Packing Co. to Swift & Company	635	386
23—Side Track agreement, dated March 28, 1927, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and Hughes Provision Co	642	390

Proceedings before Interstate Commerce Commission in Docket No. 28714—Continued
Reporter's transcript of hearings held April 22, 1942, and June 22, 1944—Continued
Exhibits—Continued

	Original	Print
24—Side Track agreement, dated August 1, 1922, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and Koblenzer Brothers	647	393
25—Side Track agreement, dated November 27, 1916, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and the Theurer-Norton Provision Co	654	396
26—Side Track agreement, dated March 15, 1917, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and the Theurer-Norton Provision Co.; construction of extension to Swift & Co.'s track No. 1 at W. 63d St., Cleveland, O	658	400
27—Side Track agreement, dated January 22, 1934, between the New York Central R. R. Co., lessee of the Cleveland, Cincinnati, Chicago & St. Louis Ry. and Theurer-Norton Provision Co	662	403
28—Side Track agreement, dated May 14, 1934, between The New York Central R. Co., lessee of The Cleveland, Cincinnati, Chicago & St. Louis Ry., Theurer-Norton Provision Co. and Swift & Company. Supplemental agreement, dated February 19, 1935, between the same parties	674	409
29—An Ordinance by the City Council of Cleveland, O., granting The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. permission to lay a switch track across W. 65th St	687	416
30—Easements from Blumenstock & Reid Co., Henry C. Thom, et al., Theurer-Norton Provision Co., et al., Henry C. Thom, et al., The Cleveland Union Stock Yards, and H. C. Thom, et al. to The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. granting 16-foot easement to reach and serve the predecessors of present Swift & Company plant located easterly of W. 65th St. and westerly of W. 63d St	690	417
31—Letter, dated December 31, 1934, from A. Z. Baker, president and general manager, Cleveland Union Stock Yards Co. to C. M. Williams, superintendent New York Central R. Co	701	423

Proceedings before Interstate Commerce Commission in Docket No. 28714—Continued
Reporter's transcript of hearings held April 22, 1942, and June 22, 1944—Continued
Exhibits—Continued

	Original	Print
32—Letter, dated January 11, 1934, to and from the same party	703	424
33—Letter, dated October 6, 1938, from P. S. Risley, Asst. Vice President and Gen. Mgr., The New York Central R. Co., lessee of The C. C. C. & St. L. Ry. Co. to the Standard Beef Co., Cleveland, O	704	425
34—Letter, dated October 6, 1938, from F. S. Risley, N. Y. C., to Kallem Kreinberg and William A. Krasny, d. b. a. Kreinberg & Krasny, Cleveland, O	706	426
35—Letter, dated October 6, 1938, from F. S. Risley, N. Y. C., to Earl C. Gibbs, Inc.	708	427
36—Letter, dated October 6, 1938, from F. S. Risley, N. Y. C., to Swift & Co., Cleveland, O	710	428
37—Letter, dated November 22, 1938, from F. S. Risley, N. Y. C. to Swift & Company, Cleveland, O	712	429
38—Letter, dated December 2, 1938, from Swift & Company to F. S. Risley, Asst. Vice President, N. Y. C. R. R. Cleveland, O	713	430
39—Letter, dated January 6, 1939, from F. S. Risley to Swift & Company, Cleveland O	714	430
40—Letter, dated January 30, 1939, from Swift & Company to F. S. Risley	715	431
41—Letter, dated October 6, 1938, from F. S. Risley, N. Y. C., to the Hughes Provision Company, Cleveland, O	716	432
42—Letter, dated October 6, 1938, from F. S. Risley, N. Y. C., to Christian Koblenzer and Matthias Koblenzer, d. b. a. Koblenzer Brothers, Cleveland, O	718	433
43—Letter, dated October 6, 1938, from F. S. Risley, N. Y. C., to Theurer-Norton Provision Co. and Swift & Company, Cleveland, O	720	434
44—Letter, dated November 11, 1938, from The Theurer-Norton Provision Co., to F. S. Risley, Cleveland, O	722	435
45—Letter, dated November 29, 1938, from F. S. Risley to Theurer-Norton Provision Co., Cleveland, O	723	435
46—Letter, dated November 18, 1938, from Koblenzer Bros. to Interstate Commerce Commission	725	436

Proceedings before Interstate Commerce Commission in Docket No. 28714—Continued
Reporter's transcript of hearings held April 22, 1942, and June 22, 1944—Continued
Exhibits—Continued

	Original	Print
47—Letter, dated November 26, 1938, from W. P. Bartel, Sec'ty, I. C. C. to F. O. Stafford, F. T. M., N. Y. C., Cleveland, O.	726	437
48—Letter, dated December 6, 1938, from F. O. Stafford, F. T. M., N. Y. C., to W. P. Bartel, Sec'ty, Interstate Commerce Commission, with attached Exhibits "A" and "C"	727	437
49—A "Stipulation" testimony of Pearson F. March, Special Agent, Interstate Commerce Commission, in Ex Parte No. 127	733	442
50—Photostat copy of an agreement dated November 2, 1926, between The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. and Swift & Company covering crossing gates and signals at Union Stock Yards and W. 65th Street, with accompanying map	735	443
51—Joint petition of complainants and defendant for rehearing, reconsideration and redetermination of reasonable charges for loading and unloading livestock at Cleveland, O., as of June 19, 1944, and thereafter	736	444
52—Ordinance passed by the City Council of Cleveland, O., granting to the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. the right-of-way to lay a switch track across and along W. 63d Street	745	449
53—Agreement, dated July 14, 1916, between the Cleveland Union Stock Yards Co. and the Cleveland Provision Company	748	451
54—Copy of deed dated July 14, 1916, from Cleveland Union Stock Yards Company to the Cleveland Provision Company conveying to the latter, its successors and assigns, certain premises	751	452
55—Grant of right-of-way of a 16-foot right-of-way	754	454
56—Same grant as Exhibit 55, showing metes and bounds	758	458
59—Letter, dated June 18, 1919, from H. L. Gallen, Traffic Mgr., Swift & Company to E. M. Costin, Federal Manager, Big Four Railroad (C. C. C. & St. L. Ry. Co.)	762	461
60—Photostat of letter dated July 7, 1919, from E. M. Costin to H. L. Gallen	766	463

	Original	Print
Proceedings before Interstate Commerce Commission in Docket No. 28714—Continued		
Reporter's transcript of hearings held April 22, 1942, and June 22, 1944—Continued		
Exhibits—Continued		
61—Photostat of letter, dated July 16, 1919, from H. L. Gallen to E. M. Costin	767	463
Reporter's transcript of oral argument heard June 4, 1943	772	465
Caption and appearances	772	465
Argument of—		
Mr. R. D. Rynder	774	466
Mr. C. B. Heinemann	799	479
Mr. R. R. Pierce	811	485
Mr. R. D. Rynder (reply)	840	500
Reporter's transcript of oral argument heard October 3, 1945	845	502
Caption and appearances	845	502
Argument of—		
Mr. R. D. Rynder	847	503
Mr. Matthew S. Farmer	876	518
Mr. Robert R. Pierce	896	529
Mr. R. D. Rynder (rebuttal)	919	541
Schedules filed with Interstate Commerce Commission	925	544
Local Freight Tariff, W. S. Curlett, Agent, I. C. C. No. A-833, filed September 28, 1945; said schedule having been in force throughout the period November 1, 1945 to December 26, 1946, both dates inclusive, as amended by supplements thereto	925	546
Supplement No. 1 to said I. C. C. No. A-833, filed October 25, 1945	935	556
Supplement No. 2 to said I. C. C. No. A-833, filed January 9, 1946	936	557
Supplement No. 3 to said I. C. C. No. A-833, filed April 26, 1946	937	560
Supplement No. 4 to said I. C. C. No. A-833, filed June 26, 1946	939	562
Special Supplement No. 5 to said I. C. C. No. A-833, filed September 3, 1946	940	563
Railroad defendants' petition for reconsideration, reargument and modification of findings	944	571
Complainant's answer to railroad defendants' petition for reconsideration, reargument and modification of findings	994	571
Statement of points to be relied upon and designation of parts of record to be printed	1028	618
Order noting probable jurisdiction	1031	619

1 [Caption omitted.]

In District Court of the United States, Northern District of Ohio, Eastern Division

Civil No. 24435

[File endorsement omitted.]

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE ERIE RAILROAD COMPANY, THE WHEELING AND LAKE ERIE RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Motion for preliminary injunction

Filed Nov. 20, 1946

The plaintiffs herein move the Court for preliminary injunction enjoining the defendants, their employees and attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from putting into effect and enforcing the order of the Interstate Commerce Commission in Docket No. 28714 entitled Swift & Company v. Baltimore and Ohio Railroad Company, et al., on the grounds that

(1) Unless restrained by this Court defendants will perform the acts referred to;

(2) Such action by the defendants will result in irreparable injury, loss and damage to the plaintiffs, as more particularly appears in the verified complaint and the affidavit of Robert R. Pierce, attached hereto;

3 (3) The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendants but will prevent irreparable injury to plaintiffs.

The Baltimore & Ohio Railroad Company, Baker, Hostetler and Patterson, by (Sgd.) Dwight B. Buss, Its Attorneys, 1956 Union Commerce Building, Cleveland, Ohio; The Pennsylvania Railroad Company, Squire, Sanders and Dempsey, by (Sgd.) Geo. H. P. Lacey, Its Attorneys, 1857 Union Commerce Building, Cleveland, Ohio; The Erie Railroad Company, by (Sgd.) Willis T. Pierson, General Counsel, Midland Building, Cleveland, Ohio; The Wheeling & Lake Erie Railway Company,

M. B. and H. H. Johnson, by (Sgd.) John A. Duncan, Its Attorneys, 1669 Union Commerce Building, Cleveland 14, Ohio; The New York Central Railroad Company, by (Sgd.) Robert R. Pierce, Chief Assistant General Attorney, 1324 West Third Street, Cleveland 13, Ohio.

4 *Affidavit in support of motion for preliminary injunction*

STATE OF OHIO,
Suyahoga County, ss:

Robert R. Pierce, being duly sworn, says that:

(1) He is one of the attorneys for the plaintiffs in the above-entitled action and was one of the attorneys for the plaintiffs herein who were respondents in the action styled Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., before the Interstate Commerce Commission under Docket No. 28714;

(2) He has personal knowledge of all of the facts hereinafter stated;

(3) The New York Central operates main lines of railroad in Cleveland in the vicinity of West 65th Street. The Cleveland Union Stock Yards Company has and operates a stock yards located southerly of the New York Central's main tracks. The Stock Yards has a sidetrack which connects with the New York Central main track lead, and this Stock Yards track extends southerly along the west side of West 65th Street. Swift and Company has and operates a meat processing plant which is located generally easterly of the Stock Yards. Swift and Company has a sidetrack which does not connect directly with the New York Central main line railroad. In order that the New York Central for itself and the other plaintiffs and Cleveland railroads may make deliveries of livestock to the Swift and Company sidetrack, the cars must first be moved over the sidetrack of the Stock Yards before reaching the Swift and Company's private sidetrack. The Stock Yards Company has refused, and continues to refuse, to permit move-
ments over its sidetrack between the New York Central
5 main line and Swift and Company's sidetrack, without compensation, either from Swift and Company or from the New York Central and other Cleveland railroads, substantially equal to the yardage charges which would be payable to the Stock Yards if Swift and Company accepted deliveries of livestock at the unloading chutes and pens in the Stock Yards. Swift and Company has refused to pay the Stock Yards Company for permission to use its private sidetrack and has demanded that the

railroads make deliveries to its plant and absorb the charge for the use of the Stock Yards track in its line haul rates.

The order of the Commission directs the plaintiffs and the Nickel Plate to abstain from refusing to make livestock deliveries to Swift and Company's plant and to establish and put in force by November 30, on five days' notice, a tariff providing for delivery of livestock to Swift and Company's plant.

(4) Unless defendants are enjoined and restrained during the pendency of this action from the enforcement of the order of the Interstate Commerce Commission above referred to, the plaintiffs will suffer great and irreparable damages in the following respects:

(a) The compliance by the plaintiffs with said order of the Commission would require The New York Central Railroad Company to commit acts of trespass upon the property of The Cleveland Union Stock Yards Company, thereby subjecting it to suits for damages or actions to restrain it from continuing such trespasses.

(b) Should the plaintiffs fail, neglect, or refuse to comply with the order of the Commission they, their officers, agents, and representatives would be subject to severe and irrecoverable penalties under the provisions of Section 16 (8) of the Interstate Commerce Act, 49 U. S. C. Anno. 16 (8).

6 (c) Should the plaintiffs commerce making deliveries of livestock to Swift and Company in compliance with the order of the Commission and then be restrained by court of competent jurisdiction from continuing to make such deliveries, the result would be endless confusion in the transportation of interstate shipments of livestock to the Swift and Company at Cleveland.

(d) Should the plaintiffs, in order to comply with the order of the Commission without interference by the Stock Yards Company, choose to pay and absorb in their line haul rates the charges which would be exacted by the Stock Yards Company, it would be guilty of giving an unlawful preference or rebate to Swift and Company.

(e) Compliance by the plaintiffs with the order of the Commission to make deliveries to Swift and Company over the tracks of the Stock Yards Company, without permission of the Stock Yards Company, would constitute an unlawful deprivation of Stock Yards property without due process of law.

(f) The effect of the order of the Commission is that the handling of livestock over the tracks of Stock Yards Company would be to extend the railroad of the New York Central, contrary to Sections 1 (18) to 1 (22), without the railroad previously having

filed any application for such extension. Hence, compliance with the order would amount to extension of the New York Central Railroad without proper authority.

Further affiant saith not.

(Sgd.) ROBERT R. PIERCE.

Sworn to before me and subscribed in my presence this 20th day of November A. D. 1946.

L. N. SHANER,
Notary Public,
Notary Public, Cuyahoga County, Ohio.

My commission expires June 6, 1949.

7 In United States District Court

Civil No. 24435

[Title omitted.]

Complaint

Filed Nov. 20, 1946

I

(a) The plaintiffs bring this action under the Act of Congress approved October 22, 1913, and known as the District Court Jurisdiction Act, 38 Stat. 219, U. S. C. Title 28, Secs. 41 (27) to 48, to enjoin, set aside and annul a certain order made and entered by the Interstate Commerce Commission and dated May 3, 1946, in a proceeding before it, styled No. 28714, Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., the Commission's report in said proceeding being entitled Swift and Company vs. Baltimore and Ohio Railroad Company, et al., 266 I. C. C. 55; and also to enjoin the enforcement of said order. The plaintiffs herein are The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, The Erie Railroad Company, The Wheeling and Lake Erie Railroad Company, and The New York Central Railroad Company.

(b) A copy of said order, to become effective August 30, 1946, and of the report of said Commission, which is referred to in and made a part of said order, are appended hereto, marked Exhibit A. The details of the unlawful effect which this

8 Report and Order will have upon the plaintiffs herein are set forth in Section VII and VIII of this complaint.

(c) Under date of July 25, 1946, said Commission issued its further order in said No. 28714, providing that the effective date of its order of May 3, 1946, therein be modified to become effective

October 30, 1946; and under date of October 17, 1946, said Commission issued its order in said No. 28714, further modify its previous order to become effective November 30, 1946, and certain schedules or tariffs were ordered to be published on fifteen days' notice; and on November 13 said order was modified to become effective November 30, 1946, on five days' notice; copies of said further orders are appended hereto, marked Exhibits B–1, B–2, and B–3.

II.

Plaintiffs herein are common carrier railroad corporations engaged in the transportation of passengers and property in interstate commerce, and subject to the Interstate Commerce Act and to the Acts amendatory thereof and supplemental thereto; each plaintiff is organized, or authorized, under the laws of the State of Ohio to do business in the State of Ohio, and one or more of said plaintiffs have a residence or a principal operating office in Cleveland, Ohio.

III

The United States of America is made a defendant in this suit under the authority of said District Court Jurisdiction Act, 38 Stat. 219, and 36 Stat. 1149.

IV

The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce approved February 4, 1887, 24 Stat. 383, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting interstate commerce under said Interstate Commerce Act and the various acts amendatory thereof and supplemental thereto.

9

V

Position of Swift and Company in its complaint filed with the Interstate Commerce Commission:

On or about September 3, 1941, Swift and Company, which is organized under the laws of the State of Illinois, with principal office and place of business in Chicago, Illinois, engaged in the packing house business and operating a packing plant at Cleveland, Ohio, filed with the Interstate Commerce Commission a complaint against the plaintiffs herein, The New York, Chicago and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate"), The Cleveland Union Stockyards Company and The Livestock Terminal Service Company, and said complaint was docketed

as No. 23714; in said complaint it was alleged that the complainant maintains in Cleveland a plant for the processing of livestock, located approximately between West 63rd Street and West 65th Street and directly across West 65th Street from said The Cleveland Union Stockyards Company, which said plant is equipped with certain railroad sidetrack facilities connected with the lines or tracks of the plaintiffs herein; that adjacent thereto complainant maintains livestock pens upon its property at which livestock can be received and unloaded from railroad cars and held awaiting slaughter; that prior to November 12, 1938, the plaintiff herein and the Nickel Plate delivered carload shipments of livestock upon said railroad siding adjacent to complainant's said plant at Cleveland, Ohio, the total rate and charge for such delivery being included in the line haul rates of said plaintiffs herein and the Nickel Plate on livestock from the points of origin to Cleveland, Ohio; that C. C. C. and St. L. tariff I. C. C. No. 8785, and prior issues thereof, showed complainant's plant at Cleveland, Ohio, as an industry on that railroad at Cleveland, Ohio, for the purpose of receiving and shipping all classes of freight; that said tariff published a charge of $3.47 per car for switching carload shipments of livestock from the lines of the other railroads in Cleveland, Ohio, to said plant of complainant; that the tariffs of said plaintiffs herein and the Nickel Plate provided for the absorption of said switching charge so that livestock was delivered to said plant of complainant without any charge over and above the line haul rates upon livestock in carloads from the various points of origin to Cleveland, Ohio; that effective November 12, 1938, in supplement 44 to C. C. C. and St. L. tariff No. 8785, the application of the switching charge of $3.47 was restricted so as not to apply on livestock; that said restriction left the railroads (other than The New York Central Railroad Company) without any rates applicable in connection with the delivery of interstate shipments of livestock to complainant's plant at Cleveland, Ohio, and that since November 12, 1938, as a result of the restriction of said switching charge, the plaintiffs herein and the Nickel Plate have failed and refused, over the protest of complainant, to deliver livestock in carloads upon the railroad siding and to the facilities adjacent to complainant's plant at Cleveland, Ohio.

The complainant further alleged that said The Cleveland Union Stockyards Company, was and is the owner of a certain railroad track or tracks over which plaintiffs herein and the Nickel Plate necessarily moved their cars in making delivery to complainant's plant at Cleveland, Ohio; that said The Cleveland Union Stockyards Company notified plaintiffs herein and the Nickel Plate that it would no longer permit the use of said railroad track or tracks

by plaintiffs herein and the Nickel Plate in connection with delivery of carload shipments of livestock to complainant's plant at Cleveland, Ohio; that, as a result of this notice by said The Cleveland Union Stockyards Company, to plaintiffs herein and the Nickel Plate, the plaintiffs herein and the Nickel Plate refused and still refuse to deliver carload shipments of livestock to the sidetrack adjoining complainant's plant at Cleveland, Ohio; that, as a result of said refusal by plaintiffs herein and the Nickel Plate,

11 direct shipments of livestock to complainant intended for its Cleveland plant are denied delivery except through the public stockyards and other facilities of said The Cleveland Union Stockyards Company; and that complainant has been deprived of the delivery of livestock cars at its own railroad sidetrack facilities adjacent to its plant.

It is further alleged in said complaint that plaintiffs herein and the Nickel Plate deliver to and receive from complainant's plant in Cleveland all classes of freight, other than livestock, in carloads; that other companies engaged in processing meat products, located in the same vicinity and in active competition with complainant, receive deliveries of interstate shipments of livestock direct to their railroad sidings, that under a new tariff of The Livestock Terminal Service Company, effective August 10, 1944 (said The Livestock Terminal Service Company was dissolved shortly after October 1, 1944, and was the company which performed the services of loading and unloading carload shipments of livestock at the public stockyards facilities of The Cleveland Union Stock Yards from June 1, 1940, to September 30, 1944, which was a portion of the period during ... ch a controversy existed between the Stock Yards, Cleveland railroads and Swift and Company with respect to what constituted a reasonable charge for performing certain services in connection with loading and unloading livestock), there is no provision for the absorption of any unloading charge of said named Service Company, and makes an allowance of only 90 cents per car for unloading cars of livestock at the facilities of said The Cleveland Union Stockyards Company; that such provisions of the tariff require complainant to pay charges in excess of those previously paid on line haul rates of railroad defendants therein upon livestock to Cleveland "due solely to the failure and refusal of the railroad defendants therein to deliver livestock to the sidetrack facilities at complainant's plant at Cleveland, Ohio."

Complainant further alleged that (a) the current charges are unreasonable in violation of Section 1 (5) of the

12 Interstate Commerce Act; (b) it is deprived of lawful transportation to which it is entitled in violation of Section 1 (3) of said Act; (c) railroad defendants therein have

abandoned the operation of a portion of their line of railroad necessary to the delivery of carload shipments of livestock at complainant's plant in Cleveland without prior authority therefor, in violation of Sections 1 (18), (19) and (20) of said Act; (d) it is subjected to unjust discrimination in violation of Section 2 of said Act; and (e) undue and unreasonable preference and advantage have been given to its competitors, in violation of Section 3 (1) of said Act.

VI

The position of the plaintiffs herein in this matter is as follows:

(1) Carload shipments of various commodities consigned to and shipped from Swift & Company's plant in Cleveland, Ohio, are transported over certain yard tracks, among which is a track known as No. 245, which is shown in colors and designated upon a blueprint, marked Exhibit C, which is attached hereto.

At a point within the boundaries of West 65th Street in the City of Cleveland, said Track No. 245, at its northerly end, is connected with and diverges from the main tracks of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (known as the "Big Four"), the railroads and properties of which company is now, and has been since 1930, leased to and operated by The New York Central Railroad Company, one of the plaintiffs herein, which said plaintiff company will be referred to hereinafter as the New York Central; beginning at the point of connection with the New York Central main tracks described hereinabove, said Track No. 245 extends toward the south for approximately 2,544 feet along a general northerly and southerly line, is located westerly of and in close proximity to the westerly side of West 65th Street, in the City of Cleveland, Cuyahoga County, Ohio,

13 (2) The initial or northerly 1:2 feet of said track is owned by and located upon the right of way of the New York Central; the next 1,619 feet of said track extending toward the south is owned and controlled by and located upon property owned and controlled by The Cleveland Union Stockyards Company, hereinafter referred to as the Stock Yards (the southerly 190 feet of this 1,619 feet of said Track No. 245 owned by the Stock Yards is located on property over which an easement was reserved by the Stock Yards when that portion of the land occupied by this track was conveyed to Standard Beef Company and Kreinberg and Krasny), and the southerly 793 feet portion of said Track No. 245 is owned by one of the plaintiffs, the New York Central, and is located upon lands which are owned by the Stock Yards or were reserved for sidetrack purposes by the Stock Yards when certain parcels of land were sold by the Stock Yards. Most of this 793 feet of track was constructed at the request of,

and pursuant to arrangements made by Swift & Co. in 1910 in order to enable Swift & Co. to get a track to its plant on West 63rd Street which would be reached and served by traversing the aforementioned 1,619 feet of track owned by the Stock Yards.

At the request of Swift and Company, a switch track known as No. 240, which diverges from said track No. 245 at a point about 82 feet south of the south end of the 1,619 feet of track owned by the Stock Yards, was built in 1910 and extended in an easterly direction across West 65th Street in order to connect with a private sidetrack which Swift & Co. was having constructed to its plant located parallel to and immediately west of the westerly side of West 63rd Street; this switch track was constructed across West 65th Street under a permit granted to the Big Four in accordance with arrangements made by Swift and Company with the City of Cleveland, and said track was extended easterly of West 65th Street on land procured by Swift & Company
14 and easements procured by Swift & Company for right of way purposes were furnished to the New York Central in order to complete the construction of this switch track to serve the private sidetracks at Swift and Company's plant, which said private sidetracks serving Swift and Company's plant are owned by Swift and Company.

(3) The Commission's record is replete with evidence showing that Swift and Company, the complainant, with full knowledge that the 1,619 feet of track was owned by the Stock Yards, and after full consideration and long deliberation chose to, and did, provide the right of way and obtain an ordinance permit to cross West 65th Street so as to enable Swift and Company to procure an indirect track connection with the New York Central main tracks by using the 1,619 feet of track owned by the Stock Yards, with all of the attendant uncertainties (of which the present development is one), rather than to provide its own right of way at the northerly end of West 63rd Street.

This route from New York Central's tracks and right of way at the northerly end of West 63rd Street for a direct track connection to Swift and Company's plant was feasible and available and Swift and Company's plant sidetrack could have been constructed to connect directly with the New York Central tracks at the north end of West 63rd Street and could have been provided at any time by Swift and Company so as to entitle that company to all of the rights which Swift and Company is now demanding and which the Commission has ordered the plaintiffs herein and the Nickel Plate to provide to Swift and Company. However, Swift and Company deemed such direct track connection, which was for many years, and may yet be, available, and which is reasonably practicable and could be constructed with safety in

accordance with Section 1 (9) of the Interstate Commerce Act, to be economically undesirable.

From 1908 to 1930 Swift and Company was content to accept delivery of its carload shipments of livestock through the
15 unloading facilities of the Stock Yards, and to have delivery to and shipment from its plant of other commodities made by traversing the 1,619 feet of track owned by the Stock Yards.

(4) From 1910 until the present time, carload shipments of all classes of commodities, exclusive of livestock, consigned to or shipped from Swift and Company's private sidetrack, were transported over said 1,619 feet of track owned by the Stock Yards and the other tracks described hereinbefore as part of the transportation service included in the line haul rates named in tariffs filed and published by plaintiffs herein. The only period during which carload shipments of livestock were moved over the 1,619 feet of track owned by Stock Yards to Swift and Company's private sidetrack in any appreciable volume was between January 1, 1930, and February 1, 1935. No livestock has been delivered at Swift and Company's plant since 1938.

(5) In connection with transporting said carload shipments of livestock consigned to, and other commodities consigned to and shipped from, Swift and Company's plant, for carriers other than the Big Four, said plaintiff, the New York Central, published and had in effect what is known as its Big Four District switching tariff, in which the names of certain shippers, including Swift and Company, were shown as industries on its railroad, to and from which switching service was provided for at specified switching charges, and the railroad carriers other than New York Central, plaintiffs herein, absorbed the switching charge published in said tariff for switching services performed on the Big Four District of the New York Central in connection with shipments consigned to or from Swift and Company's plant and transported to or from Cleveland over railroads other than the Big Four District of the New York Central.

Effective February 1, 1935, the Stock Yards served notice upon the New York Central of termination of the sidetrack agreement of June 16, 1924, between the Stock Yards and the New York Central, and Section Fourth of that agreement was
16 amended effective February 1, 1935, as outlined more in detail hereinafter, to provide that the free use of the 1,619 feet of track owned by Stock Yards for "competitive traffic" was prohibited, said competitive traffic being construed by the parties to mean "livestock," and that a charge for the use of said 1,619 feet of track for shipments of livestock "shall be" the subject of a separate agreement. The Stock Yards then demanded certain charges on livestock moved over the 1,619 feet of track owned

by it to the plant of Swift and Company and other packers, and at that time in 1935 the plaintiffs herein and the Nickel Plate discontinued making delivery of livestock to Swift and Company's plant or to any packers by using the 1,619 feet of track owned by the Stock Yards. Although various negotiations were conducted looking toward reaching an agreement, no such separate agreement as to a charge for moving livestock over said 1,619 feet of track owned by the Stock Yards was reached, and the switching tariff of the New York Central was amended, effective November 12, 1938, to indicate that Swift and Company's plant was not an industry located on the New York Central for delivery of livestock.

On August 14, 1941, Swift and Company demanded that the plaintiffs herein and the Nickel Plate deliver livestock to its private sidetrack, which would have required resuming the use of said 1,619 feet of track owned by the Stock Yards for that purpose, and on September 27, 1941, plaintiffs herein and the Nickel Plate advised Swift and Company that they could not make delivery of livestock at Swift and Company's plant without traversing a track owned by the Stock Yards; that the plaintiffs herein and the Nickel Plate would be glad to comply with Swift and Company's request

"when, as and if we are advised by you that you have obtained the consent of the owner of this track for the use thereof without obligation to the railroads, for the delivery of livestock shipments to your plant. You will appreciate that until this consent is obtained by you, we will be unable to comply with your request."

17 Swift and Company has since billed its livestock for delivery at its private siding, which instructions plaintiffs herein have ignored, and delivery of livestock has been tendered and accepted by Swift and Company under protest at the unloading pens in the Stock Yards facilities.

(6) Prior to the time that the Big Four railroads and properties were leased to the New York Central, the Big Four had entered into several private sidetrack agreements with the Stock Yards, providing for certain lands owned by the Stock Yards to be used for various tracks owned by the Big Four, and also for the use by the Big Four of the 1,619 feet portion of track No. 245, which is owned by the Stock Yards. The earlier agreements beginning in 1899 set forth that the 1,619 feet of track was constructed on lands owned by the Stock Yards and at the cost of the Stock Yards, and said 1,619 feet of track and the land occupied thereby was owned by the Stock Yards. The Big Four was required to maintain said 1,619 feet of track at the expense of the Stock Yards and the Big Four was given the right to use said 1,619 feet of track in business other than that of the Stock Yards

"provided such use of sidetrack will not interfere with the business of the Second Party (Stock Yards)."

This contract, dated May 10, 1899, contained a 60 days' termination clause.

On June 16, 1924, another private sidetrack agreement was made between the Stock Yards and the Big Four pertaining to the 1,619 feet of track in controversy and other tracks, and in that agreement the ownership by the Stock Yards of said 1,619 feet of track was recognized by the parties thereto, the agreement of May 10, 1899, was cancelled, a thirty-day termination clause was inserted in said new agreement, and paragraph Fourth of said agreement of June 16, 1924, reads as follows:

"Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Indus-
18 try; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land."

Having an important bearing on this subject at this juncture is the fact that from November 2, 1916, to April 28, 1936, at the request of Swift & Co.'s President, Swift & Co.'s Cleveland plant manager served continuously as a Director of the Stock Yards and was a member of the Executive Committee when there was such a committee in existence, and from 1920 to 1924 Swift & Co.'s traffic manager was a member of the Transportation Committee at the Stock Yards; also, during the period from 1916 to 1936 Swift and Company owned about 6% of the stock of the Stock Yards Company. The Supreme Court of the District of Columbia, in Equity Case No. 37623, entitled "United States of America, Petitioner, vs. Swift and Company, et al., Defendants," on January 31, 1931, directed Swift and Company to divest itself of ownership of stock in public stock yards (including The Cleveland Union Stock Yards Company), which was finally accomplished in 1936. After the above-mentioned Court ordered Swift & Co. to divest itself of ownership of stock in public stock yards, the number of shipments of livestock consigned direct to Swift & Co.'s plant sidetrack was increased, whereas theretofore, and since the inception of its operations in Cleveland, such shipments of livestock had been consigned to and unloaded at the unloading chutes and pens of the Stock Yards which are located directly across West 65th Street from Swift & Co.'s plant.

From January 1, 1930, to February 1, 1935, Swift & Co. directed 1,161 carloads of livestock to be delivered at its plant sidetrack, which necessitated moving said shipments over the 1,619 feet of

track owned by the Stock Yards. Such carload shipments of livestock consigned directly to Swift and Company's plant attained such a volume as to effect a reduction in the earnings of the Stock Yards and resulted in the Stock Yards giving notice to the New York Central in January 1935, that the private sidetrack
19 agreement of June 16, 1924, between Stock Yards and the New York Central was thereby terminated on 30 days' notice and a new private sidetrack agreement between Stock Yards and the New York Central, effective February 1, 1935, which contained a 30 days' termination clause, was entered into in which the hereinabove quoted paragraph Fourth was amended to read as follows:

"Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, except for competitive traffic a charge for which use shall be the subject of a separate agreement, of any and all tracks or portions thereof belonging to the Industry and located on its land."

On May 11, 1943, the Commission made certain findings in 255 ICC 579–598, entitled Baltimore & Ohio RR Co., et al., vs. Cleveland Union Stock Yards Co., with respect to the common carrier obligations in connection with the services and charges connected with loading and unloading livestock. In determining a reasonable charge for services of loading and unloading livestock, the Commission failed to include therein values for lands occupied by certain tracks, whereupon the Stock Yards sought rental for such lands. As a result of negotiations between the New York Central Railroad and Stock Yards at that time, a supplemental agreement to sidetrack agreement dated June 16, 1924, between the New York Central Railroad Company, successor to and lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and The Cleveland Union Stock Yards Company, was entered into and, in part, pertains to the limited use which is permitted of Stock Yards' tracks, including the 1,619 feet of track involved in this controversy. A copy of this agreement, marked Exhibit D, is attached hereto.

(7) No agreement as to a charge for the use of the 1,619 feet of track owned by the Stock Yards Company in order to place
20 carload shipments of livestock at Swift and Company's plant sidetrack was ever reached, although numerous conferences were held. The Stock Yards Company demanded of the plaintiffs herein and the Nickel Plate charges aggregating from $6.00 to $9.00 per car on a per head of livestock basis, which

the plaintiffs herein and the Nickel Plate considered exorbitant for such use of said 1,619 feet of track. Litigation was instituted in Common Pleas Court by the Stock Yards against some of the plaintiffs herein and the Nickel Plate, covering the use of the 1,619 feet of track and other services performed in connection with loading and unloading carload shipments of livestock at the Stock Yards.

When the Stock Yards persisted in restricting the use of its portion of the track with respect to competitive traffic, or livestock, the plaintiffs herein looked to the private sidetrack agreements with the industries served by traversing the 1,619 feet of track owned by Stock Yards, and in a letter dated October 6, 1938, the New York Central notified Swift and Company and the other industries served by traversing the 1,619 feet of track owned by the Stock Yards, that the New York Central was unable to effect satisfactory arrangements with the Stock Yards to make possible the handling of livestock over said 1,619 feet of track, and requested Swift and Company and said other industries to endorse their acceptance of said change in their respective sidetrack agreements, all of which contained 30- or 60-day termination clauses. Three of the industries agreed to this modification, two of the industries did not reply, and Swift and Company acknowledged receipt of the notice from the New York Central, but refused to agree to a change in its private sidetrack agreement, replying that it did not see why the New York Central desired to change the agreement, as the 1,619 feet of track was not being used for
21 the delivery of carload shipments of livestock to Swift and Company's plant.

In private sidetrack agreements between Swift and Company and the New York Central, both parties retained the right to discontinue the use of the track and to require its removal on 60 days' notice. On May 25, 1912, a similar agreement was executed by the said parties as to an extension of Swift and Company's sidetrack. The agreements of October 27, 1910, and May 25, 1912, were superseded by one dated November 25, 1916, providing for a further extension of Swift and Company's plant sidetrack at Swift and Company's expense for construction and maintenance and to be owned by Swift and Company. This agreement also contained a 60 days' termination clause in favor of both parties.

Swift and Company purchased from The Federal Packing Company the latter's plant, September 27, 1930. At that time The Federal Packing Company had a private sidetrack covered by an agreement, dated May 28, 1927, with the Big Four. This private sidetrack agreement was amended November 24, 1930, and was

assigned by The Federal Packing Company to Swift and Company, April 2, 1938, and Swift and Company, as successors, assumed the obligations of this contract. This agreement likewise contained a termination clause requiring the giving of 30 days' notice by either party to that effect. This agreement contained numerous provisions, among which is the following:

"Fourth. The railroad shall have the right to cease, forthwith and without notice, all operations upon said track, if compelled so to do by the owners, other than the respective parties hereto, of any portion of said track, or of the land upon which said track, or any portion thereof, may be laid."

Notwithstanding the termination clauses in all of the private sidetrack agreements with Swift and Company, and the next hereinbefore quoted provision in the sidetrack agreement of May 28, 1927, when requested in a letter, dated October 6, 1938, to endorse its acceptance on one copy of that letter of the modification of its sidetrack agreements with respect to relieving the New York Central from handling livestock over said 1,619 feet of track, Swift and Company replied December 2, 1938, as follows:

22

"Referring to your letters of October 6 and November 22.

We have received a reply from Chicago in which they state they have no objection whatever to acknowledging the two letters which you sent us, but they do think they should have some protection in the way of a written understanding that in the event of a strike, or anything else, that will prevent delivery of livestock through the Cleveland Stock Yards facilities, we can use this track for direct deliveries. We shall be obliged if you will let us have a letter to this effect and we will immediately send it to Chicago and arrange for acknowledgment of your letter of October 6."

On January 6, 1939, the New York Central sent the following letter to Swift and Company:

"Referring to your letter of December 2, 1938, in which you refer to our letters to you of October 6th and November 22nd, respectively, relating to discontinuance of delivery of livestock over track owned by The Cleveland Union Stock Yards Company, and quote the substance of a letter to you from your Chicago office:

You must realize that the New York Central is not discontinuing the service referred to in its letters of October 6th and November 22nd because of a desire on its part to do so, but only because the price demanded by the Stock Yards Company for service over its side track was so high that this Company could not afford to use the track and pay the price demanded.

Under the circumstances, you will also realize that the New York Central could not undertake to insure service over this track in case of a strike at the Stock Yards, unless some arrangements were made with the Stock Yards Company to permit the service upon a fair basis.

It occurs to us that your company might be better able to arrange for service over the Stock Yards track than the New York Central has been able to do."

A letter dated January 30, 1939, from Swift and Company was received, reading as follows:

"We have been somewhat delayed in replying to your letter of January 6, with reference to your suggested change in our present agreement covering the track on the westerly side
23 of West 65th Street and owned by the Cleveland Union Stock Yards Company, as we wished to make a thorough check of the situation. Since doing this, we find no logical reason for changing our agreement.

We find that you are not making any deliveries of livestock over this track and have not been for a good many months. Also, in the event of a strike, fire, or any other condition that should tie up the Stock Yards, we will naturally expect you to make direct deliveries of livestock to our plant over this track, which is the only track available for such purposes, and it is our understanding that you must provide proper delivery facilities for any consignee of livestock.

In any event, we cannot see why you wish to change this agreement, as you are not using this track for the delivery of livestock."

After a lapse of time, Swift and Company sent a letter dated August 14, 1941, to the plaintiffs herein and the Nickel Plate, reading as follows:

"In order to avoid the possibility of excess charges which may accrue if the livestock shipped to Cleveland, Ohio, is delivered by your lines at the Cleveland Union Stock Yards, Swift and Company will immediately bill all its shipments of livestock for Cleveland for delivery at its plant in Cleveland and you are requested to see that such delivery is made."

On September 27, 1941, plaintiffs herein and the Nickel Plate wrote a letter to Swift and Company which, among other things, stated:

"As you know, the railroads cannot make delivery of livestock at your plant without traversing a track owned by The Cleveland Union Stock Yards Company. We shall be glad to comply with your request when, as and if we are advised by you that you have obtained the consent of the owner of this track for the use thereof without obligation to the railroads, for the delivery of livestock shipments to your plant. You will appreciate that until

this consent is obtained by you, we will be unable to comply with your request."

The complaint upon which the Commission's order is based was then filed by Swift and Company against the plaintiffs herein, the Nickel Plate, the Stock Yards, and The Livestock Terminal Service Company.

(8) The Commission held hearings on said complaint at
24 Cleveland, Ohio, April 22, 1942; a proposed order was issued by Examiner Carter in April 1943, recommending the dismissal of the complaint. Swift and Company requested oral argument, which was granted by the Commission, and oral argument was had before the entire Commission on June 4, 1943. By order of the Commission (on its own motion) of June 14, 1943, the case was reopened for further hearing and was heard at Cleveland, Ohio, on June 22, 1944. Further briefs were filed by all parties in October 1944.

In May 1945, a proposed report was issued by the Examiners, again proposing the dismissal of the complaint. Exceptions to this report were filed by Swift and Company on August 1, 1945. The case was again argued before the entire Commission on October 3, 1945, and the report and order of the Commission which is sought to be set aside and annulled in this action was rendered on May 3, 1946.

VII

As will be seen by an examination of said report and order of the Commission dated May 3, 1946, the plaintiffs herein, The New York, Chicago and St. Louis Railroad Company, The Cleveland Union Stock Yards Company and The Livestock Terminal Service Company (which latter named company has not been in existence since about October 1944) were notified and required.

(a) to cease and desist from refusing to deliver to the sidetrack of Swift and Company in Cleveland, Ohio, Swift and Company's interstate shipments of livestock consigned to said track and carried over the railroads of the plaintiffs herein and the Nickel Plate, and

(b) to establish and put in force, on or before the 30th day of November 1946, upon not less than 15 days' notice to the Commission and to the general public, as provided in Section
25 1 (6) of the Interstate Commerce Act, and maintain in force thereafter a schedule or schedules providing for the delivery to the sidetrack of Swift and Company in Cleveland of its interstate shipments of livestock consigned thereto and carried over the railroads of the plaintiffs herein and the Nickel Plate.

VIII

As set forth more in detail hereinafter:

(a) The Report and Order of the Commission contain findings and requirements which transcend the constitutional and statutory powers of the Commission, and also misinterpretations and misapplications of the law, which would subject plaintiffs herein to irreparable damages and penalties.

(b) The Report and Order of the Commission contain findings which plaintiffs herein aver are not supported by any substantial evidence in the record, nor is there any rational basis to support certain conclusions, and for such reasons, are totally insufficient to support the ultimate findings and conclusions of the Commission and the order based thereon.

(c) In reaching the conclusions stated in the Report, the Commission has totally disregarded the evidence offered by the defendants (plaintiffs herein) and has arbitrarily and capriciously based its findings upon arguments and assertions made by complainants in the proceedings before the Commission, unsupported by any substantial evidence as will be shown hereinafter.

(d) In reaching its conclusions and in making its findings the Commission acted arbitrarily and unreasonably respecting important facts established by defendants (plaintiffs herein), and as respects certain fundamental principles of law, as set forth hereinafter.

26 (1) The Report and Order of the Commission is void and of no effect because of the impossibility of carrying it into effect. It would require the plaintiffs herein to commit an act of unlawful trespass upon the property of others, and thereby subject plaintiffs herein to further litigation and irreparable damages; and requires an impossible performance by plaintiffs herein, for the failure of which performance plaintiffs herein, their officers, representatives or agents, would be subjected to heavy and irretrievable penalties under Section 16 (8) of the Interstate Commerce Act, 49 U. S. Code Anno., Paragraph 16 (8).

(a) plaintiffs herein are ordered to publish, and maintain in force thereafter, tariffs providing for the rendering of service over lands and 1,619 feet of track which are not owned or controlled by any of the plaintiffs herein, but which lands and 1,619 feet of track are owned and controlled by the Stock Yards and can be used by plaintiffs herein only to the extent, and upon such terms only as, the owner of said property, i. e., the Stock Yards, will permit, and

(b) thereafter to perform the service of delivering carload interstate shipments of livestock to Swift and Company's plant sidetrack, which would necessitate moving said shipments over

and trespassing upon the said land and 1,619 feet of track owned and controlled by the Stock Yards, in order to comply with the requirements of the Commission in said Report and Order, and which said land and 1,619 feet of track owned and controlled by the Stock Yards cannot be used for the purpose required in the Order because of the fact that the terms of the sidetrack agreement now in force and effect between the New York Central and the Stock Yards, pertaining to the use by the New York Central of said land and 1,619 feet of track owned by the Stock Yards, prohibits such use of said land and track unless a charge for such use is paid to the Stock Yards. The order of the Commis-
27 sion would require the plaintiffs herein to exercise a greater right in the said land and 1,619 feet of track owned and controlled by the Stock Yards, than they in law and fact possess.

(c) None of the plaintiffs herein are vested with power to compel the Stock Yards to extend the use of its solely owned land and 1,619 feet of track to the New York Central to make possible the delivery of carload interstate shipments of livestock to Swift and Company's plant sidetrack, as is required by the order of the Commission, except possibly by means of land appropriation proceedings in a State court which, if successful, would cause irreparable, unwarranted and extensive damages to accrue to the plaintiffs herein, especially in view of the fact that the Stock Yards claims, among other things, that said 1,619 feet of track occupies its valuable street frontage land, and the use thereof must be preserved for such purposes as will serve its own best interests.

(d) The New York Central has received from the Stock Yards a notice in writing dated November 15, 1946, marked Exhibit E, attached hereto, terminating the use of the 1,619 feet of track and land occupied thereby, effective May 15, 1947, under the terms of the existing sidetrack agreement between the Stock Yards and the New York Central. The Stock Yards remains adamant in its refusal to permit the use of its 1,619 feet of track for the movement thereover of shipments of livestock to Swift and Company or any other packers, except upon conditions which will reserve to it the right to continue extending the use of said land and track on the basis of a private easement, together with such provisions as will prevent said track acquiring a status of a publicly
28 dedicated spur, and such provisions as will protect the interests of the Stock Yards. The Stock Yards considers such traffic to be competitive with and detrimental to its own business.

(e) Irreparable damages to plaintiffs herein would result if they attempted to comply with the order and under the Interstate Commerce Act plaintiffs herein could be subjected to fines

and penalties if they fail to obey the Order. The Commission has transcended its constitutional and Statutory powers by ordering plaintiffs herein to trespass upon property of others and to render a service to Swift & Co. which is over and beyond the transportation obligation of plaintiffs herein.

(2) The Report and Order of the Commission are arbitrary and unreasonable in that they contain indefinite, uncertain, and ambiguous conclusions. They indicate that a majority of the Commission has, by implication, recognized that the 1,619 feet of track and the land occupied thereby, which is owned and controlled by the Stock Yards, has not become dedicated to public use; yet the Report and Order fail to give any factual recognition or legal effect whatever to this fact. The Commission seems to have characterized the status of the 1,619 feet of track and land occupied thereby as having been devoted (not dedicated) to a public use in such a way as to prohibit withdrawing it from such use, and to have disregarded what the plaintiffs herein recognize as a carefully guarded control which the Stock Yards, by written agreement with the New York Central, has retained over the use of the track and land and the right to terminate the use thereof.

(a) At page 65 (266 ICC), the Report and Order reads, in part, as follows:

"* * * By the contract, the Stock Yards is not withdrawing its track from public use but, on the contrary, is contracting for its continued use as a part of the railroad's common carrier spur No. 245. *Whatever may be the right of the Stock*
29 *Yards to altogether withdraw its track from public use*, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common carrier status of the New York Central's spur No. 245 but that the latter remains with respect to its said spur, as much subject to the Act and its provisions as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places." [Italics ours.]

and on page 67 (266 I. C. C.) the Commission finds:

"* * * *Whatever may be the Stock Yards' right to altogether withdraw its track from public use, in our opinion it may not, so long as contracting for its continued public use;* exact compensation on any such basis. *In any event, here we must look to the present contract and act on the existing practices. We cannot conjecture as to the future arrangements further than to assume that they will be lawful. Under the present contract,* the New York Contral is obligated to maintain track 1619 in good condition and repair but it seems manifest, and we so conclude, that, by resuming its duty to make deliveries of livestock over its spur, it will not incur lawful obligation to pay yardage charges

assessed as a penalty if it performs such a duty." [Italics ours.] The foregoing italicized qualifications apparently warrant the following comment in the dissenting opinion of Commissioner Splawn on page 77 (266 ICC):

"There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use."

The foregoing inference is also consistent with the recognition which the Commission gives to the right of the Stock Yards Company and New York Central to contract with respect to the use of the Stock Yards' track within the limitations expressed by the Commission's decision and the failure of the Commission to adopt the position taken by Swift and Company that this track had become dedicated to a public use and could not be withdrawn from public service.

Many arbitrary, uncertain and ambiguous observations
30 and conclusions in the decision are indicative of the uncertainty and doubt which must have existed in the minds of the Commission with respect to what relief, if any, could be granted complainant by the Commission.

(b) On the bottom of page 57 (266 ICC), the Commission holds

Portions of the spur from the main line to complainant's siding were dedicated to public use by various easements conveyed to the railroads by the Stock Yards, complainants, and others."

but there is no consideration given by the Commission to the terms of the easements and the various agreements; nor does the Report indicate what portions of the track there under discussion were dedicated to public use.

The Commission fails to consider the terms of the easements, one in particular referring to Sublot No. 166, situated just easterly of West 65th Street and in which the fee is owned by the Stock Yards. Swift and Company procured the easement over this sublot from the Stock Yards in 1910 in order to accomplish the construction of a track to its plant. One of the reservations in this easement reads:

"It is understood that in the event a connection between the Prim Street (now West 63rd Street) track and the main tracks of said Railway Company is made, at or near Clark Avenue, said Grantor (Stock Yards Company) reserves the privilege of having the connection switch between the Prim Street track and the Stock Yards track removed."

31 (c) Again, on page 69 (266 ICC), the report reads as follows:

"The only reason advanced for the failure to perform such service is the question as to the New York Central's right to use its spur for the delivery of livestock because of its contract with

the Stock Yards respecting the use of track 1,619. We have found, however, that such contract has not altered the common carrier status of the spur or the railroads' duties with respect thereto under the provisions of the Act. Accordingly, based on the above facts, circumstances and considerations, we find and conclude the defendants' failure in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter sidetrack, is an unreasonable and unlawful practice in violation of Section 1 (6) of the Act.

Furthermore, Section 1 (9) of the Act, earlier outlined, which empowers us to require the railroads to construct, maintain and operate switch connections with private sidetracks constructed to connect therewith, shows clearly the intent and purpose of the law to clothe us fully and specifically with authority over the matter of the railroads' service in making delivery and taking receipt of freight directly to and from the sidetracks of shippers."

The Report and Order are arbitrary, ambiguous and contradictory in acknowledging that the Stock Yards may withdraw its 1,619 feet of track from use altogether but cannot lawfully limit its use—a proposition which is obviously contrary to the concepts of the law of property.

(d) No provision is found in the term "railroad" contained in Section 1 (3) (a) of the Interstate Commerce Act to the effect that private property used by one carrier under contract for limited purposes thereby becomes a railroad for unlimited use without agreement, condemnation or dedication. The Commission fails to apply this rational construction of the law.

(3) The Report and Order of the Commission are arbitrary and unreasonable in utterly disregarding the practices and rules promulgated by the Interstate Commerce Commission in connection wi[illegible] Parte 104, Part II, Terminal Services,
32 which prac[illegible]es and ru[illegible]s pertaining to the placing and spotting of cars on sidetracks were upheld by the United States Supreme Court in United States of America and Interstate Commerce Commission vs. American Sheet and Tin Plate Company, et al., 301 U. S. 402, 412, decided October 11, 1937. The Report and Order of the Commission are arbitrary and lack a rational basis in that they would require an absolute violation by the plaintiffs herein of Ex Parte 104, Part II, in connection with services required therein to be rendered to Swift and Co. The findings and order of the Commission in Ex Parte 104 (209 I. C. C. at page 45) referred to above read substantially as follows:

"When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a

plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9, and 10 of the appendix, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier, of the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of Section 6 of the act.

"Generally the payments of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally. Such payment or performance dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

(a) The ownership and control by the Stock Yards of its land and 1,619 feet of track and the restrictions placed thereon
33 with reference to competitive business being moved over the same creates such interruption and interference in reaching Swift and Company's plant as is contemplated in Ex Parte 104.

(b) Said order of the Commission would require the plaintiffs herein to provide Swift and Company with such superior services and conveniences as would constitute undue preference and advantages which are not extended or required to be extended to shippers generally.

(4) The Report and Order of the Commission are arbitrary, unreasonable, and contain a misinterpretation of the law in that they hold that failure of the plaintiffs herein to accord delivery of interstate shipments of livestock to Swift and Company's plant by traversing the said 1,619 feet portion of track No. 245, which is owned and controlled by the Stock Yards, and over which carload shipments of livestock are not permitted by the Stock Yards to be transported, while plaintiffs herein accord such service in connection with like shipments consigned to the other three named packers, subjects Swift and Company to undue prejudice and unduly prefers the other three named packers; and that said practice of the plaintiffs herein is in violation of Section 3 (1) of the Interstate Commerce Act; that the circumstances and conditions of transportation to the Swift and Company plant and

said other three named packers are substantially the same, and that all said plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory, and that active competition exists between said parties in purchasing the live animals and in selling the dressed products. This holding is unsupported by any law whatsoever and is inconsistent with and contrary to many other holdings of the Commission.

34 (a) Due to the fact that Swift and Company does not have its own private sidetrack constructed to the right of way and there connected with the railroad of the New York Central, the hereinbefore described 1,619 feet of said track No. 245, which is owned and controlled by, and located upon the property of, the Stock Yards, has to be traversed in order to reach the private sidetrack at said plant of Swift and Company. This condition alone creates circumstances which are dissimilar to and not in anywise parallel with the situation existing with respect to the Lake Erie Provision Company, Long Dressed Beef Company and Ohio Provision Company—the other three named packers designated in the Report and Order as receiving undue advantage and preference—because said other three named packers own their own individual and separate private sidetracks at other locations in the general vicinity of the Stock Yards, which three individual and separate private sidetracks are constructed to the right-of-way and connected directly with the railroad of the New York Central, which enables said other three named packers to be served without traversing any facilities which are not under the sole control of the railroad.

(b) The first principle of the Commission's many decisions with respect to Section 3 issues is that the circumstances and conditions applying to the compared situations must be substantially similar. They are not substantially similar in the cases discussed in the report and order because of the Stock Yards' control over its track, as pointed out in Commissioner Splawn's dissenting opinion. In the recital of facts on pages 59 and 68 (266 I. C. C.), the Report and Order of the Commission recognize this distinctive fact, for it recites that the defendant carriers are transporting shipments of livestock

"directly to the plants of complainant's competitors, The
35 Lake Erie Provision Company, Long Dressed Beef Company and Ohio Provision Company, whose private sidetracks are adjacent to the Stock Yards, *but are served without using tracks of the Stock Yards.* * * * The three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located."

The fact italicized above indicates a very substantial distinction between the situation of the three named packers and Swift and Company. If the Stock Yards Company exercises its implied right to close its track altogether, as it now has done, and as the Commission concluded it could do, the distinction becomes absolute and controlling.

(c) The Commission then proceeds to find on page 68 (266 I. C. C.), that undue prejudice against Swift and Company exists because

"* * * all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territories; and that active competition exists between them in purchasing the live animals and in selling the dressed products. * * *"

The Commission has used as a basis for a finding of Section 3 violation in this controversy such general indistinctive factors as the existence of business competition among the packers involved and the proximity of these packers to the New York Central's Cleveland Yard, rather than to apply the requirement of substantially similar conditions, and fails to give consideration to such a salient factual condition as the Stock Yards' undisputed ownership and control of its 1,619 feet of track which is involved with respect to shipments of livestock consigned to Swift and Company's plant as compared to individual direct private track connections owned and maintained by the other three named packers.

36 (5) The Report and Order of the Commissioner are arbitrary and unreasonable in that they ignore the fact that through the relationship and dealings which existed for many years between Swift and Company and the Stock Yards, Swift and Company had full knowledge at all times of the carefully guarded control retained by Stock Yards of its 1,619 feet of track and the restricted use thereof, all of which creates, or should create, an estoppel to any attempt by the Commission to hold that this 1,619 feet of track owned by the Stock Yards can be categorized as a public spur, in which Swift and Company would virtually acquire a vested interest under the holding of the Commission.

(6) The Report and Order of the Commission are arbitrary and unreasonable in that they ignore entirely the uncontradicted early history, circumstances and practices, including the history of the relationship between Swift and Company and the Stock Yards, which gave rise to the present controversy, which omission presents a situation directly contrary to the position taken by the Commission in determining the issues in the Chicago Stock Yards case (Swift & Comany, et al. v. Alton Railroad Company, et al.,

238 I. C. C. 179), which was affirmed by the United States Supreme Court May 4, 1942, in Swift and Company v. United States, 316 U. S. 216, 86 L. Ed. 1391. The early history of the relationship between Swift and Company and the Stock Yards in the instant case is equally as important in this controversy as was the relationship between the packers and the Stock Yards enterprise at Chicago, which early history, circumstances and practices were considered by the Commission and the Supreme Court of the United States as being extremely important.

37 (7) The Report and Order of the Commission virtually create new rights for the future for Swift and Company rather than disposing of the controversy involved in the complaint under present contracts, existing conditions and practices, and the long history in connection therewith. The Commission has arbitrarily and capriciously based its said findings upon arguments and assertions made by complainant in the proceeding before the Commission, in erroneously assuming and concluding that Swift and Company is entitled to have delivery of carload shipments of livestock resumed now over the 1,619 feet of track owned by Stock Yards so as to enable Swift and Company to build and construct additional unloading chutes and facilities which have not been in existence in the past, and thus be able to unload at one time several carloads of livestock as contrasted with the practice in the past, when only one carload could be unloaded at one time. On page 59 (266 I. C. C.) the Report reads "on this siding only one car at a time can be spotted for unloading at the runway leading west through the plant about 150 feet to the 10 storage pens. * * *. By constructing moveable platforms and placing them alongside the cars, several cars of livestock could be unloaded at one time." Yet the Commission, on page 67 (266 I. C. C.), among other things, concludes: "In any event, here we must look to the present contract and act on the existing practices."

(8) The Report and Order of the Commission contain assumptions of fact which are not supported by the record, and unjustifiably and inequitably penalize the New York Central for having obtained the best arrangement possible with the owner for the use of the 1,619 feet of track owned by the Stock Yards in making delivery of such commodities consigned to Swift and Company's plant.

38 (9) The Report and Order are based upon arbitrary assumptions of fact, to which have been applied misinterpretations of law and decisions. The Report and Order have failed to consider or have completely and unjustifiably ignored pertinent facts and court decisions, and have misinterpreted and misapplied laws which have resulted in reaching unwarranted conclusions of fact and law.

IX

Unless the relief prayed for herein, including the issuance of an interlocutory or temporary injunction, be granted to plaintiffs herein, they will suffer irreparable injury and damage for the reasons and in the manner stated in this complaint.

Wherefore, plaintiffs herein pray:

(a) that the Court, as soon as practicable after the filing of this complaint, shall call to its assistance in the hearing and determination thereof, two (2) other judges, of whom one shall be a Circuit Judge;

(b) that a temporary or interlocutory injunction be entered herein, restraining, enjoining, and suspending, until the further order of this Court, the operation, execution, effect, and enforcement of said Report and Order of the Commission;

(c) that after final hearing this Court adjudge, order and decree that said Report and Order of the Commission are, and at all times have been, beyond the lawful authority of the Commission and wholly void, and that said order be perpetually vacated, set aside, suspended, and annulled, and the enforcement thereof perpetually restrained and enjoined; and

(d) such other and further relief as equity and good conscience shall require be granted to the plaintiffs herein.

The Baltimore and Ohio Railroad Company, Baker, Hostetler and Patterson, by Dwight B. Buss, Its Attorneys, 1956 Union Commerce Building, Cleve-
39 land, Ohio; The Pennsylvania Railroad Company, Squire, Sanders & Dempsey, by Geo. H. P. Lacey, Its Attorneys, 1857 Union Commerce Building, Cleveland, Ohio; The Erie Railroad Company, by Willis T. Pierson, General Counsel, Midland Building, Cleveland, Ohio; The Wheeling and Lake Erie Railway Company, M. B. and H. H. Johnson, by John A. Duncan, Its Attorneys, 1669 Union Commerce Building, Cleveland 14, Ohio; The New York Central Railroad Company, by Robert R. Pierce, Chief Assistant General Attorney, 1324 West Third Street, Cleveland, Ohio.

[*Duly sworn to by Robert R. Pierce; jurat omitted in printing.*]

40 *Exhibit "A" to complaint*

24760

INTERSTATE COMMERCE COMMISSION

No. 28714

SWIFT & COMPANY

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Submitted October 3, 1945. Decided May 3, 1946

1. The refusal of defendants to deliver to the sidetrack of complainant, at Cleveland, Ohio, livestock shipments consigned thereto, while contemporaneously providing such service to complainant's competitors, found to be unduly prejudicial and preferential in violation of section 3 (1), an unreasonable and unlawful practice in violation of section 1 (6) and in violation of section 1 (9) of part I of the Interstate Commerce Act, Order issued directing the correction of these violations.
2. Where complainant makes application in writing to a railroad for the operation of a switch connection, has tendered interstate traffic to such carrier and the carrier has refused to maintain or operate such connection for the transportation of livestock to complainant's plant, and the record shows operation over the track for a number of years for the transportation of livestock, and at present for the transportation of commodities other than livestock, and the connection is practicable and may be made with safety, as in this case, and will furnish reasonable compensation to the carrier with whose line the connection is made, and the carrier refuses to maintain and operate such connection, a discrimination against complainant and a violation of section 1 (9) is found to exist.
3. Carriers cannot make contracts which abrogate the provisions of the Interstate Commerce Act.
4. The record does not contain evidence authorizing an award of reparation.

Ross D. Rynder for complainant.

W. N. King, R. R. Pierce, Kemper A. Dobbins, D. P. Connell, John J. Fitzpatrick, Andrew P. Martin, Willis T. Pierson, Dwight B. Buss, G. H. P. Lacey, A. Z. Baker, M. S. Farmer, and C. R. Heinemann for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by complainant to the report proposed by the examiners, and the issues were argued orally. Our conclusions differ from those recommended by the examiners.

By complaint filed September 5, 1941, complainant corporation alleges that the refusal and failure of defendants to deliver interstate carload shipments of livestock to complainant's sidetrack facilities at its packing plant in Cleveland, Ohio, have subjected and will subject complainant to charges for the transpor-

41 tation of livestock which were, are, and will be unreasonable, unjustly discriminatory, unduly preferential of complainant's competitors at Cleveland, unduly preferential of commodities other than livestock, and unduly prejudicial to complainant. Violations of section 1 (3) (a), (5), (18), (19), (20), and of sections 2 (1), 3 (1), and 6 (7) of the Interstate Commerce Act are alleged. In its briefs complainant urges that the evidence also establishes violations of section 1 (4), (6), and (9) of the act. The complaint is broad enough for us to consider the case under those provisions of the act as well as others. To plead the law relied on is no more necessary in a proceeding before the Commission than it is in a judicial proceeding. Chicago, R. I. & P. Ry. v. United States, 274 U. S. 29.

Complainant seeks the establishment of tariff provisions under which it may have transported to its plant carload shipments of livestock at rates not in excess of the railroad defendants' line-haul rates to Cleveland, thus restoring on shipments over the lines of carriers other than the New York Central the services and deliveries which were authorized by tariffs prior to November 12, 1938, and over the New York Central the services and deliveries authorized by its present tariffs. Complainant also seeks reparation in such sum as it may have been or may be required to pay, in excess of the line-haul rates, in order to obtain delivery of livestock, since August 10, 1941, and pendente lite. Reference herein to The New York Central Railroad Company will include its predecessor, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, lessee); and reference to complainant will include its predecessors, Henry C. Thom, People's Packing Company, and People's Packing & Provision Company.

The Cleveland Union Stock Yards Company, hereinafter called the Stock Yards, is made a defendant, and is alleged to be partially responsible for the alleged violations of the act. The Stock Yards is a proper party defendant in this proceeding, as its interests are directly affected by the rates, regulations or practices under consideration within the meaning of section 2 of the Elkins Act, 49 U. S. C. A., sec. 42, shown in the footnote.[1]

Complainant's packing plant at Cleveland extends from West Sixty-third Street on the east to West Sixty-fifth Street on the

[1] "That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

west and is directly across Sixty-fifth Street from the stock-
42 yards. The mainline of the New York Central runs north-
east and southwest some distance north of complainant's plant and along the northern boundary of the stockyards. Leading south from the main line and just west of Sixty-fifth Street is spur track No. 245 of the New York Central. The initial 132 feet of this spur is owned and operated by the railroad. The spur then continues 1,619 feet south over tracks and land owned by the Stockyards but maintained and operated by the railroad, hereinafter called track 1619. Continuing south of track 1619 and connecting with it is another railroad owned section of the spur, about 793 feet along. This section forms a wye, then crosses Sixty-fifth Street and swings northeast to the west side of Sixty-third Street, thence north just west of that street to complainant's siding and the sidetracks of three other industries, including a packing plant operated by Koblenzer Brothers. Track 245 affords the only rail connection between these four industries and three others located west of Sixty-fifth Street, all south of the main line, and the railroads serving Cleveland. Complainant's private sidetrack is operated under an agreement with the New York Central.

The facts with respect to the construction of track 1619 are as follows: On May 10, 1899, the Stock Yards and the New York Central entered into an agreement for its construction. The Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became the owner thereof. The New York Central laid the track and maintained it at the Stock Yards' expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The railroad reserved the right, after 60 days' notice in writing, to discontinue the use of the track and to remove the connections. The agreement of May 10, 1899, was superseded by another of June 16, 1924, confirming the Stock Yards' ownership of track 1619 and providing for the maintenance thereof by, and at the expense of, the railroad. The free use of that track by the railroad was stated to be in consideration of maintenance. That agreement provided for its termination by either party on 30 days' written notice, but did not provide specifically that railroad use of the track should not interfere with the Stock Yards' business. The New York Central keeps track 1619 in repair and controls and operates the locomotives and other rolling stock which pass over it. Portions of the spur from the main line to complainant's siding were dedicated to public use by various easements conveyed to the railroad by the Stock Yards, complainant, and others.

Effective February 1, 1935, after 30 days' notice in writing, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," construed by the
43 parties to mean livestock, "a charge for which use shall be the subject of a separate agreement." The Stock Yards then demanded on livestock delivered over track 1619 to chutes of complainant and other specified parties the charges named in Stock Yards' tariff No. 5 applicable to livestock consigned through the stockyards direct to packers and not offered for sale, ranging from 5 cents per head on sheep to 20 cents per head on cattle, or from $6 to $9 per carload. On September 7, 1938, the Stock Yards' charge became $5 per deck. No agreement concerning such charges was reached between the railroad and the Stock Yards, and on November 12, 1938, the switching charge of the New York Central was made inapplicable to livestock. In the meantime defendants had discontinued deliveries of livestock to complainant's siding. The carriers considered the charges demanded by the Stock Yards prohibitive as compared with a reciprocal switching charge of $3.47 per car then maintained by the railroads. By letter of August 14, 1941, complainant demanded that the line-haul carriers deliver livestock to its siding, which demand was refused. Complainant has since billed its livestock to its siding, which instructions defendants have ignored. Delivery has been tendered and accepted under protest at the unloading pens in the stockyards.

Events leading to the construction of the tracks to complainants' plant were as follows:

Beginning September 14, 1907, complainant and certain other industries negotiated for a direct spur from the New York Central's main tracks at Sixty-third Street, thence south over Sixty-third Street and across private land of the Lake Erie Provision Company to complainant's plant. A city ordinance to cross Sixty-third Street was obtained on May 25, 1908, and in May 1909, the court condemned the private land, awarding $13,500 damages. This made the total estimated cost of the track about $24,500. The track was not built as the interested parties were unwilling to bear so great an expense. Had this track been built it would not have been necessary to use track 1619 to reach complainant's plant.

In March 1910, complainant negotiated for the construction of the existing connection with its plant, which, as previously shown, crosses Sixty-fifth Street. It obtained the necessary city ordinance on September 6, 1910. The right-of-way east of Sixty-fifth Street, excepting a small parcel obtained from the stockyards, was conveyed to the railroad by complainant. The New York Central thus used (1) its own spur track, (2) stockyards' track

1619, and (3) its own tracks, to reach complainant's siding. Portions of the railroad's own tracks were laid over its own right-of-way across West Sixty-fifth Street, and on land covered by easements from the stockyards, complainant, Theurer-Norton Provision Company, and others.

44 Under a sidetrack agreement dated October 27, 1910, between complainant and the New York Central, the railroad was to construct and maintain the plant track at its own expense, to own the track, and to use it for business other than that of complainant when such use would not interfere with complainant's business. Both parties retained the right to discontinue use of the track and to require its removal on 60 days' notice. On May 25, 1912, a similar agreement was executed as to an extension of complainant's sidetrack. The agreements of October 27, 1910, and May 25, 1912, were superseded by one dated November 25, 1916, providing for a further extension of complainant's siding at complainant's expense for construction and maintenance, to be owned by complainant. This agreement also contained 60-day termination clauses in favor of both parties. On April 2, 1938, an agreement covering a sidetrack of the Federal Packing Company immediately north of complainant's siding was assigned to complainant. That agreement also contained a 30-day mutual termination clause.

In the western side of its plant complainant has 10 covered holding pens, sufficient to hold from 5 to 8 double-deck carloads of livestock. Two of the pens are for animals suspected of disease or imperfections. The other 8 pens are used for stock intended for slaughter, which is driven directly across the street from the stockyards, and for stock unloaded from trucks just south of the plant or from cars on complainant's siding near the southeast corner of the plant. On this siding only 1 car at a time can be spotted for unloading at the runway leading west through the plant about 150 feet to the 10 storage pens. By constructing movable platforms and placing them alongside the cars, several cars of livestock could be unloaded at one time. Truck shipments are received at a different entrance but reach the same alleys and pens. Complainant has land available south of its plant for enlarging its unloading and storage facilities.

From 1910 to February 1, 1935, defendants transported all classes of freight, including livestock, to and from complainant's siding over track 1619, and since February 1, 1935, they have transported all freight, other than livestock, to and from such siding over said track. Defendants also transport carload shipments of livestock to the private sidetracks of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company whose tracks are adja-

cent to the stockyards but are served by defendants without using tracks belonging to the stockyards. This service is performed by the carriers at the line-haul rates to Cleveland, and the three competitive plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located.

45 Prior to November 12, 1938, the tariffs of the defendant rail carriers provided for delivery of carload shipments of livestock to complainant's siding in Cleveland at the line-haul rates to that point regardless of whether the shipments moved in line-haul service over the New York Central direct to Cleveland or over the lines of other carriers to points of interchange there with the New York Central and thence in switching service by the latter carrier to complainant's siding. The interline or interchange movements were made under authority of a reciprocal switching tariff of the New York Central, which provided for a switching charge of $3.15 (later $3.47) per car for switching carload freight generally, including livestock, from points of interchange with other carriers in the Cleveland switching district to the siding of complainant as well as numerous other industrial sidings in Cleveland. The tariffs of the other carriers provided for absorption of the New York Central's switching charge when their revenues exceeded specified amounts. On November 12, 1938, the New York Central canceled its switching charge on livestock but continued it on all other freight. Since then there has been no specific tariff authority for movement of livestock to complainant's siding when shipped to Cleveland over lines other than the New York Central. No similar cancelation was made, however, as to rates on shipments of livestock billed to complainant's siding for movement in line-haul service over the New York Central to Cleveland. On such traffic the tariffs of that carrier provided, and still provide, for delivery to complainant's siding at the line-haul rates to Cleveland. Nevertheless, for some time prior to November 12, 1938, and continuously since then, defendants have refused to deliver any livestock to complainant's siding, whether moved to Cleveland in line-haul service by the New York Central or by other carriers. Instead they have delivered all livestock consigned by complainant to itself at Cleveland into the yards of the Stock Yards Company at that point, and have collected the Cleveland line-haul rates on all such shipments. On livestock so delivered 24 hours' free storage is allowed. The stock is driven from the unloading pens through the stockyards to an exit directly across the street from complainant's plant, thence across track 1619 and Sixty-fifth Street into the portion of complainant's plant where it is to be slaughtered. Movable gates, previously installed, confine the stock while crossing track 1619

and Sixty-fifth Street. Certain yardage charges are assessed against the stock for egress from the stockyards.

Prior to 1930, the Stock Yards made no charge for the use of its facilities on direct shipments,[2] and as delivery at the stockyards was then as satisfactory to complainant as delivery on its own siding it billed little, if any, livestock to that siding,
46 although tariffs in effect when the siding was constructed and thereafter had authorized such delivery. About 1930, the Stock Yards attempted to charge packers for delivery on direct shipments through the yards, and between January 1, 1930, and February 1, 1935, complainant had 1,161 carloads delivered at its siding on which it paid the line-haul rates to Cleveland. Apparently such deliveries ceased after the latter date. During the same period, complainant also received 2,260 carloads through the stockyards. During a short period in 1934, the Stock Yards collected from the packers certain yardage charges; but, when the packers objected and threatened to divert shipments from the stockyards, the effort to collect such charges from them was abandoned. A charge of $4 per deck for delivery at the stockyards was paid and borne by the road-haul carriers to and including June 9, 1942. This included delivery to complainant.

Between 1916 and 1936, complainant owned stock in the stockyards. Its plant managers at Cleveland from November 2, 1916, to April 28, 1936, served as directors of the stockyards. From 1920 to 1924 the traffic manager of complainant, the stockyards, and the Cleveland Provision Company formed a traffic and transportation committee for the stockyards district. By order of the Supreme Court of the District of Columbia, dated January 31, 1931, complainant was required to divest itself of ownership in public stockyards which was accomplished at Cleveland February 8, 1936.

The duties of the railroads with respect to in-bound shipments of livestock to consignees at the Cleveland Stock Yards include the furnishing of suitable pens for unloading and the service of unloading from the cars into such pens. When those services are performed the carriers' duties are completed. The Secretary of Agriculture has asserted jurisdiction of charges on direct shipments to packers for services accorded by the Stock Yards beyond the unloading pens. For a complete discussion of this question, see Baltimore & O. R. Co. v. Cleveland Union Stock Yards Co., 255 I. C. C. 579, decided May 11, 1943. Since then complainant has been required to pay service charges to the Stock Yards in order to obtain possession of its direct shipments through

[2] Direct shipments of livestock are defined to mean livestock consigned directly to packers for slaughter, and not offered for sale in the public market.

the yards. As stated, the instant complaint seeking delivery at its siding was filed by complainant on September 5, 1941.

The New York Central excuses its failure to make the delivery to complainant's siding in Cleveland as called for in its lawfully filed and published tariffs, which delivery was requested by complainant from and after August 14, 1941, on the ground that to do so it would have to use track 1619 and pay to the Stock Yards Company charges of from $6 to $9 per car demanded by that concern for the use of that track. The New York Central considers these charges exorbitant. It therefore refuses to
47 pay them or to deliver livestock to complainant at its siding.

It is our opinion that carrier may not evade the provisions of its lawfully filed and published tariffs on such grounds. In our report in Guyton & Harrington Mule Co. v. Louisville & N. R. Co., 50 I. C. C. 546, 550, in respect of a somewhat similar situation at Nashville, Tenn., we found that the delivery of livestock, moving as defined in the Interstate Commerce Act, to complainant's siding in Nashville, at the line-haul rates to Nashville, was a privilege and facility shown in the lawfully filed and published tariffs of the delivering carrier, that the denial of the use of those facilities to complainant there was a rule, regulation, or practice in contravention of the carriers' tariff provisions which changed or affected the value of the service rendered to complainant as shipper and consignee, and that it was and will be unlawful for the delivering line to refuse to make deliveries of livestock to complainant's siding in Nashville.

The carrier's defense presents the question of whether a railroad, by entering into a contract with the Stock Yards Company aimed at compelling shippers making livestock shipments to Swift and the other industries beyond the track of the Stock Yards Company to use the facilities of the Stock Yards Co., can abrogate obligations placed upon it, in the public interest, by the Interstate Commerce Act. It is our opinion that it cannot, and that the relief sought by Swift should be granted.

Section 1 (1) of the Interstate Commerce Act declares: "The provisions of this part shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad * * *." Section 1 (3) (a) provides that the term railroad shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation * * * of * * * persons or property * * * including all freight depots, yards or grounds used or necessary in the transportation or delivery of any such property." It defines the term "transportation" as includ-

ing "locomotives, cars, * * * and all instrumentalities and facilities of shipment or carriage irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, * * * and handling of property transported."

Section 1 (4) provides that—"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor." Section 1 (6) declares:

> It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the manner and method of * * * delivering property for transportation, the facilities for transportation, * * * and all other matters relating to or connected with the handling, transporting, storing, and delivery of property * * * which may be necessary or proper to secure the safe and prompt * * * handling, transportation, and delivery of property * * * upon just and reasonable terms, and every unjust and unreasonable * * * regulation and practice is prohibited and declared to be unlawful.

48

Section 3 (1) provides that—

> It shall be unlawful for any common carrier subject to this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

Section 1 (9) provides—

> Any common carrier subject to the provisions of this Act, upon application of * * * any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any * * * private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.

And it authorizes us upon complaint and hearing to enforce performance of that duty.

Section 15 (1) provides for the enforcement of these several provisions of the law.

These provisions of the law are complementary and clearly confer upon us the power and duty of regulating and controlling the practices of carriers affecting the transportation and delivery of property, and with respect to all the road, instrumentalities, and facilities used by them in performing such services.

Under agreements with the Stock Yards, the New York Central has for years used, and still is using, track 1619 as part of its railroad and terminal facilities at Cleveland. And the agreed use has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New York Central's spur No. 245, by which the latter makes

delivery and takes receipt of freight in performing its common-carrier switching service to and from the plant of complainant and the several other plants and industries served by the spur. Obviously, the fact that the New York Central, acting in compliance with its private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over its spur 29 does not alter the fact that the use it is making of the spur, including track 1619, is generally for all traffic offered and all industries reached and is not one confined to the serving of the Stock Yards or other particular plant. As stated by the Supreme Court in Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, 221–222:

A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. * * *

Track 1619 and the said railroad spur No. 245 which includes such track are located in the State of Ohio. In Morgan Run Ry. Co. v. Public Utilities Commission, 120 N. E. 295, the Supreme Court of Ohio had before it a situation closely analogous to that before us here. In that proceeding the owners of a certain coal mine reached by a common-carrier railroad serving them over a short intermediate track owned by a competing coal company, but operated by the railroad under an agreement with the owner, were being denied service because of objections from the owner of the intermediate section of track. The Public Utilities Commission of Ohio, which operates under a statute somewhat similar to the provisions of sections 1 and 3 of the Interstate Commerce Act, entered an order requiring the railroad to discontinue its unlawful practice and to resume service to the complaining mine. Upon appeal this order was sustained by the Supreme Court of Ohio in the above cited case. In its opinion the court said:

It is contended that the order of the commission requires the railway company to furnish facilities and operate a line on property now owned by it, that the commission has no jurisdiction to require one who is not a common carrier to act as such, and that the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction. Section 523, General Code, provides that the commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over tracks of such railroad. Section 8990, General Code, requires all railroad companies to extend to all persons receiving and shipping freight the same and equal opportunities. This statute is declaratory of the common law on the subject.

As we have shown the railway company is, as to so much of the line of railroad as is owned or operated by it, a common carrier; and any arrangement made by it for the transportation of freight over its road in connection with private tracks is subject to the jurisdiction of the commission.

The court therefore held that:

As long as the railway company operates any portion of the railway in question, it must do so without discrimination in favor of any shipper. This is a small and unimportant railroad, whose operations are very limited; but the questions that are brought to the court for consideration are not limited. They affect every common carrier. If this company may arbitrarily select those whom it will serve, any company may do so.

Here, as above pointed out, the agreed as well as actual use by the New York Central of the Stock Yards' track 1619 is not as a mere private track but is as an essential part of its spur No. 245. To say that the Stock Yards, while granting the use of its track 1619 generally for common-carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by special provisions in their contract, change and nullify the laws under which the latter operates. By the contract, the Stock Yards is not withdrawing its track from public use but, on the contrary, is contracting for its continued use as part of the railroad's common-carrier spur No. 245. Whatever may be the right of the Stock Yards to altogether withdraw its track from public use, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common-carrier status of the New York Central's spur No. 245 but that the latter remains, with respect to its said spur, as much subject to the act and its provisions as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places.

Before considering the provisions of the act involved in their application to the facts of record, it will be helpful to give further and more particular consideration to the terms of the Stock Yard's contract with the New York Central and their operation in effecting the exclusion of livestock from the traffic switched by the latter over its spur. Such contract does not expressly forbid the use of track 1619 for the carriage of livestock but rather singles it out as a special class of traffic for burdensome treatment. In terms, the contract simply prohibits the "free use" of the track for livestock and provides that a charge for the use thereof for livestock "shall be the subject of a separate agreement." But, after the making of the contract, the Stock Yards, in specifying the terms upon which it would agree to the use of the track for livestock, insisted that the railroad must pay, or assume, the yardage charges on livestock named in Stock Yards' tariff No. 5. The railroad refused to undertake such payments and, in lieu thereof, discontinued the switching of livestock over its spur to the siding of complainant, from which it resulted as stated above, that the latter had to accept delivery of the livestock on the premises of the Stock Yards subject to the payment of the yardage charges.

From the above, it is apparent that, while under the contract and terms of compensation subsequently demanded by the
51 Stock Yards, it was still open to the railroad to switch livestock over the spur embodying track 1619, the effect of the contract and such terms of compensation was to impose a penalty if it continued to do so. In fact, regardless of the amount of compensation specified by the Stock Yards for the use of its track for the carriage of livestock, the very singling out of livestock for the requirement of special compensation from the railroad shows that the provision is properly classed as a penalty provision, that is, one designed to secure yardage charges on livestock billed and moving to complainant's siding, either from complainant, or from the railroad engaged in hauling the traffic. The ground upon which the railroad discontinued the switching of livestock over the spur was that the compensation (consisting of the yardage charges) demanded by the Stock Yards for the incidental use of its track was exorbitant, but even if the compensation demanded had been but a fraction of that named, the railroad could, so far as the contract was concerned, have followed the same course and thus have avoided the payment of any compensation, or charge, specially set up against the use of the track for the carriage of livestock.

There has been some suggestion t' at, if we were to order the New York Central to resume the sw.tching of livestock over its spur No. 245, the result of such action would be to compel it to assume payment of the yardage charges named in Stock Yards Tariff No. 5, but we do not think that that is the case. In the first place, there is nothing in the present or previous contracts granting the use of track 1619 to the railroad which even suggests that the parties considered that, in addition to the railroad's assumption of the expense of track maintenance and other consideration for years regarded as entirely adequate, further compensation simply for such use was warranted. Apparently, it was the view of the railroad as well as the Stock Yards that the latter was within its rights as owner of the track to condition its contract for the use thereof in such way as to secure yardage charges on livestock even though billed directly to complainant's sidetrack and plant. But such yardage charges bear no relation whatever to the proper compensation payable simply for the use of the track by the railroad. They were demanded of the railroad, not for its use of the track in carrying traffic generally, but as charges specially assessed against the carriage of livestock. As said above, the provision singling out livestock for the requirement of special compensation was in fact a penalty provision, that is, a provision designed to secure yardage charges on livestock billed and moving to complainant's siding, either by stopping the movement and obtaining payment from complainant, or, if the railroad carried the

traffic through as provided in its tariffs and as bills, then as a penalty exacted from the railroad for observing its published
52 tariffs and other common-carrier duties under the Interstate Commerce Act and the Elkins Act.

It seems evident and, in any event, will be shown that the railroad could not lawfully single out and exclude livestock from the traffic transported over its common-carrier spur. It was, therefore, its duty to retain in its tariffs, as it did, the provision covering and including livestock. The fact that it ignored, and is ignoring, the tariff provision does not absolve it from the duty. The Stock Yards, we must assume, knew that it was dealing with a common carrier subject to regulatory laws. Whatever may be its right to retain the yardage charges collected from complainant in the past, if, pursuant to order entered by us, the railroad resumes the switching of livestock over its spur, it is our opinion that the Stock Yards could not lawfully collect, or the railroad pay, either yardage charges or any other amount of special compensation in effect demanded from the railroad as a penalty for observing its tariffs and other duties under the laws to which it is subjected.

The Stock Yards is, of course, entitled to reasonable compensation for the use of its track but this, we believe, does not mean compensation figured on the basis of what would be its stockyard earnings if the railroad's spur No. 245 was not open for the carriage and delivery of livestock to points beyond its yards. Whatever may be the Stock Yards' right to altogether withdraw its track from public use, in our opinion it may not, so long as contracting for its continued public use, exact compensation on any such basis. In any event, here we must look to the present contract and act on the existing practices. We cannot conjecture as to the future arrangements further than to assume that they will be lawful. Under the present contract the New York Central is obligated to maintain track 1619 in good condition and repair but it seems manifest, and we so conclude, that, by resuming its duty to make deliveries of livestock over its spur, it will not incur lawful obligation to pay yardage charges assessed as a penalty if it performs such duty.

For reasons above stated, we concluded that the contract between the New York Central and the Stock Yards had not changed the common-carrier status of the railroad's spur No. 245 but that the latter remained with respect to its said spur as much subject to the act and its provisions as it was with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places. Having in mind that, from the time of its first enactment, a principal aim of the act has been to "cut up by the roots every form of discrimination,

favoritism and inequality" (Louisville & N. R. Co. v. Mottley 219 U. S. 467, 478; O'Keefe v. United States, 240 U. S. 294,
53 297), consideration should perhaps be first given to the situation under section 3 which has resulted from the New York Central's refusal to handle livestock over its spur No. 245. While it results from such refusal that the complainant is denied any deliveries at its plant of carload shipments of livestock consigned to it but must, instead, in all cases accept delivery thereof on the premises of the Stock Yards subject to the payments of yardage charges, as above pointed out, the New York Central and other defendant carriers are at the same time continuing to transport like shipments of livestock directly to the plants of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, whose private sidetracks are adjacent to the stockyards but are served without using tracks of the Stock Yards. This service is performed by the defendant carriers at the line-haul rates to Cleveland, and the three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects complainant to undue prejudice and unduly prefers the competing plants above named.

The history of the New York Central's spur No. 245 has been outlined above. The complainant negotiated for its construction, conveyed to the railroad part of the land necessary for right-of-way, and obtained the necessary city ordinance for crossing Sixty-fifth Street. At about the same time, complainant's own plant track connecting with the spur was constructed under agreement with the railroad, and from time to time thereafter extensions of the track have been constructed under like agreements. The railroad assumed the expense of construction and maintenance, but was granted and is now exercising the right to use the track and extensions for business other than that of complainant. The

railroad's spur and complainant's sidetrack are available today, just as they have been for years, for the delivery of livestock directly to complainant's plant. For years all the defend-
54 ant railroads recognized that the performance of such service was included in the line-haul rates to Cleveland and, even today, the New York Central's tariffs provide for the service at such rates. The only reason advanced for the failure to perform such service is the question as to the New York Central's right to use its spur for the delivery of livestock because of its contract with the Stock Yards respecting the use of track 1619. We have found, however, that such contract has not altered the common-carrier status of the spur or the railroad's duties with respect thereto under the provisions of the act. Accordingly, based the above facts, circumstances, and considerations, we find a conclude that the defendants' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1 (6) of the act.

Furthermore, section 1 (9) of the act, earlier outlined, which empowers us to require the railroads to construct, maintain, and operate switch connections with private sidetracks constructed to connect therewith, shows clearly the intent and purpose of the law to clothe us fully and specifically with authority over the matter of the railroads' service in making delivery and taking receipt of freight directly to and from the sidetracks of shippers.

The language of section 1 (9) has been interpreted by the Supreme Court in Interstate Commerce Commission v. Delaware L. & W. R. Co., 216 U. S. 531, 537, as having for its object "primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch. * * *" And in United States v. B. & O. S. R. Co., 226 U. S. 14, 19, the Supreme Court stated that "the most obvious examples of such lines [lateral, branch lines] are those that are dependent upon and incident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment."

In the case of Cleveland C., C. & St. L. Ry. Co. v. United States, 275 U. S. 404, the Supreme Court held (page 408) that the authority conferred upon us by section 1 (9) of the act is not affected by the exemption of industrial, team, et cetera, tracks contained in section 1 (22); that paragraphs (18) to (21), inclusive, of section 1 do not cover sidetracks built by shippers, but section 1 (9) relates "to switch connections with private sidings built by the shipper" (page 408); that the authority to require one carrier to construct and operate a switch connection between its main line and the private sidetrack of an industry, conferred

upon this Commission by section 1 (9), is not confined to a case where the industry has no direct connection with the main line of any other carrier (pages 412–413), and that the word "shipper" as used in the paragraph is not confined to one who, at the time he makes application for the switch connection referred to in the paragraph, is a shipper over the line with which the switch connection is desired.

The word "shipper" as used in section 1 (9) is to be given a liberal construction, and includes one receiving traffic from the railroads as well as one offering such traffic for transportation. In either event, Swift comes within the definition as the record shows that the railroads deliver all other classes of freight to the Swift plant over the sidetrack in question, including coal, salt, lumber, et cetera, and move out-bound from the plant over the same track all out-bound shipments which are principally fresh meats and packing-house products. Hence, Swift is a shipper tendering interstate traffic for transportation. The next requirement is that where such a shipper makes such tender, a common carrier by railroad "shall construct, maintain and operate upon reasonable terms a switch connection with any * * * private sidetrack which may be constructed to connect with its railroad." The switch connection is actually built and in operation for all traffic other than livestock, and clearly is a part of the railroads' common-carrier facilities as defined in section 1 (3) (a). We can require its operation for livestock upon reasonable terms, provided the connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." The parties concede that the sidetrack and switch connection fully meet these quoted provisions of the law and that the only obstacle to their use for livestock is the contract discussed herein. We have said that track 1619 is now, and for years has been, devoted to a public use.

As already pointed out herein, it is the general practice of defendants to make industrial deliveries at points in the Cleveland switching district at the line-haul rates to Cleveland, and this practice would have been followed by them in respect of complainant's livestock, as it is now followed on all other carload traffic, were it not for the controversy with the stockyards over the use of track 1619. This is substantiated by the following excerpt from the oral argument of counsel for the New York Central on October 3, 1945:

> It does not make any difference to the New York Central whether this stock is placed at the stockyards' unloading pens or whether it is placed over at Swift & Company's plant. We stand ready to deliver it either place. But because of the barrier placed on this by the stockyards, the owner of the track, we are just not able to deliver over there.

Complainant points out that the New York Central is compelled to absorb unloading charges of $1.25 per single-deck car and $2.50 per double-deck car on all livestock delivered at the unloading pens of the stockyards, and that these charges would be avoided by making deliveries on complainant's siding.

56 In Baltimore Butchers Live Stock Co. v. P., B. & W. R. Co., 20 I. C. C. 124, decided February 13, 1911, we had before us for consideration a situation in respect of deliveries of livestock in Baltimore, Md., practically identical with that before us here. In that proceeding, complainant sought an order to compel the carriers to deliver livestock to its private siding, and to discontinue delivering same in the Union Stock Yards. The latter delivery had been made under a contract between the carrier and the Union Stock Yards designating the Stock Yards as the exclusive point for all livestock delivered in Baltimore. We found that the refusal of defendants to deliver to the sidetrack of complainant livestock consigned thereto was unreasonable and in violation of the law. At page 128 of our report therein, we said:

> Defendants receive the fertilizer and other products of the abbatoir on this track and deliver thereon the coal, hay, grain, and other articles needed by complainant. Moreover, they receive and deliver on this track for at least one other shipper. By long usage and in accordance with the custom of carriers generally, this track is regarded as the point of delivery and receipt of carload freight and we have heard no argument against the use of this track for livestock deliveries, except that this would be a violation of the contract which the carriers have made with the Union Stock Yards. * * * The railroads defendant may not make contracts which abrogate the act to regulate commerce; they may not refuse, because of their own contract, to furnish delivery that is reasonable upon tracks which they use as a terminal for these shippers; they may not discriminate as between commodities in the delivery which they give, where no reason exists for such discrimination excepting the presence of a contract made with a private corporation, as in this case. The amended act to regulate commerce provides that it is the "duty of all common carriers to establish, observe, and enforce just and reasonable regulations and practices affecting all matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property."

Similar observations are warranted upon the facts of record here. While the spur track in question there was owned entirely by the railroad, we do not consider this as having any legal significance in view of the operation and free maintenance of track 1619 here by the New York Central.

We find that the complainant has made application in writing to the carrier for operation of the switch connection discussed and has tendered interstate traffic to such carrier; that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant; that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the

connection is practicable and may be made with safety and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready
57 and willing to have transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central. We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section. Consequently, we find that a violation of section 1 (9) of part I of the Interstate Commerce Act follows. This paragraph forbids discrimination against any shipper, resulting from a failure on the part of the carrier to comply with its requirements. The facts show such a violation against the complainant, resulting from defendant's failure to accept and transport its shipments of livestock over the connection under the circumstances discussed in this report.

An appropriate order will be entered.

BARNARD, Chairman, dissenting:

The majority finds the refusal of defendants to deliver to the sidetrack of complainant at Cleveland, Ohio, livestock shipments consigned thereto, while contemporaneously providing such service to complainant's competitors, to be an unreasonable and unlawful practice in violation of section 1 (6), to be in violation of section 1 (9), and to be unduly prejudicial and preferential in violation of section 3 (1) of part I of the Interstate Commerce Act.

In my opinion the majority's construction of the word "practices" in section 1 (6) of the act is in conflict with the construction placed thereon by the Supreme Court in United States v. Pennsylvania R. Co., 242 U. S. 208, 228. The Supreme Court, among other things, held that no power was given to this Commission to order a carrier to provide and furnish tank cars that it did not possess even though section 1 of the act defined the term "transportation" as including "cars * * * irrespective of ownership or of any contract" for the use thereof, and made it the duty of every common carrier "to furnish and provide such transportation upon reasonable request therefor." Following the reasoning of the Supreme Court, it is my view that the failure of the railroad to acquire the use of track 1619 to transport livestock to complainant's plant is not a practice within the meaning of section 1 (6).

Section 1 (9) provides:

Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate

traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its
58 railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission other than orders for the payment of money.

This proceeding does not concern the construction, maintenance, or operation by the New York Central of a switch connection between its track and the private sidetrack adjoining complainant's plant. Such a connection has been maintained and operated by the New York Central for many years under an agreement with complainant. The only question before the Commission in this proceeding relates to the use of 1,619 feet of track constructed in 1899 by the Cleveland Union Stock Yards Company, hereinafter referred to as the Stock Yards, on land owned by it.

Complainant's packing plant extends from West Sixty-third Street on the east to West Sixty-fifth Street on the west and is directly across Sixty-fifth Street from the stockyard. The main line of the New York Central runs northeast and southwest some distance north of complainant's plant and along the northern boundary of the stockyards. Leading south from the main line and just west of Sixty-fifth Street is a spur track of which the initial 132 feet is owned and operated by the railroad. This spur then continues 1,619 feet south over tracks and land owned by the Stock Yards but maintained and operated by the railroad, hereinafter called track 1619. Continuing south of track 1619 and connecting with it is another railroad-owned spur, about 793 feet long. This section forms a wye, then crosses Sixty-fifth Street and swings northeast to the west side of Sixty-third Street, thence north just west of that street to complainant's siding and the sidetracks of three other industries including a packing plant operated by Kohlenzer Brothers. This spur track affords the only rail connection between the railroads serving Cleveland and those four industries and three others located west of Sixty-fifth Street, all south of the main line.

On May 10, 1899, the Stock Yards and the New York Central entered into an agreement for the construction of track 1619. The

Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became
59 the owner thereof. The New York Central laid the track and maintained it at the Stock Yards' expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The railroads reserved the right, after 60 days' notice in writing, to discontinue the use of the track and to remove the connections. The above-mentioned agreement was superseded by another of June 16, 1924, confirming the Stock Yards' ownership of track 1619 and providing for the maintenance thereof by, and at the expense of, the railroad. The free use of that track by the railroad was stated to be in consideration of maintenance. That agreement provided for its termination by either party on 30 days' written notice, but did not provide specifically that railroad use of the track should not interfere with the Stock Yards' business.

Effective February 1, 1935, after 30 days' notice in writing, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," construed by the parties to mean livestock, "a charge for which use shall be the subject of a separate agreement." The Stock Yards then demanded on livestock delivered over track 1619 to chutes of complainant and other specified parties the charges named in Stock Yards tariff No. 5 applicable to livestock consigned through the Stock Yards direct to packers and not offered for sale, ranging from 5 cents per head on sheep to 20 cents per head on cattle, or from $6 to $9 per carload. On September 7, 1938, the Stock Yards' charge became $5 per deck. No agreement concerning such charges was reached between the railroad and the Stock Yards, and on November 12, 1938, the switching charge of the New York Central was made inapplicable to livestock. In the meantime, defendants had discontinued deliveries of livestock to complainant's siding. The carriers considered the charges demanded by the Stock Yards prohibitive as compared with a reciprocal switching charge of $3.47 per car then maintained by the railroads. By letter of August 14, 1941, complainant demanded that the line-haul carriers deliver livestock to its siding, which demand was refused. Complainant has since billed its livestock to its siding, which instructions defendants have ignored. Delivery has been tendered and accepted under protest at the unloading pens in the stockyards.

From September 6, 1910, until January 1, 1930, complainant received its livestock at the Stock Yards and drove the stock across the street for immediate slaughter. Between January 1, 1930, and February 1, 1935, the New York Central delivered 1,161 carloads of livestock on complainant's siding, on which the Cleve-

land line-haul rates were charged under appropriate tariff provisions. Even during that period, complainant also received 2,260 carloads through the stockyards. In 1934 when the volume reached substantial proportions, the Stock Yards took steps which in effect prohibited the use of track 1619 for the transportation of livestock to others. This action was taken because Swift had been using that track to divert a substantial part of the Stock Yards' business of providing holding pens and other facilities enabling complainant to drive its livestock within the yards to the exit immediately across the street from complainant's plant.

As stated, the railroad transports all classes of freight, except livestock, to and from Swift's siding over track 1619. These other commodities are not competitive with livestock; and unlike livestock, these other commodities are not competitive with the Stock Yards' business. Moreover, I do not believe that the alleged preference of commodities other than livestock is undue under section 3 (1) because complainant is clearly benefited by use of the track for switching its traffic other than livestock.

The railroad switches livestock to sidings of three of Swift's allegedly preferred competitors in Cleveland, but those competitors, unlike Swift, reach the New York Central directly, and do not require the use of track 1619 or any other private track of the Stock Yards, as does Swift. Those competitors are not being preferred through use of that track. In fact, the railroad is prohibited from using track 1619 for livestock. No such prohibition exists with respect to the transportation of livestock to the plants of the three alleged competitors. It would not benefit Swift if that track was altogether withdrawn from use. Owing to this substantial dissimilarity of facts, the alleged preference of Swift's competitors, in my opinion, is not undue within the meaning of section 3 (1) of the act.

The evidence does not disclose any well-established or long-continued custom of free use of track 1619 for livestock. There was no public dedication of track 1619 by easement—instead the Stock Yards specifically reserved the right to terminate the sidetrack agreement. The Stock Yards has carefully guarded its control over the use of that track. So far as livestock traffic is concerned track 1619 clearly is a private track. The Commission has no authority to require the railroad to exercise a greater right in the track than it in fact possesses. The condemnation of private tracks for public use is a matter for decision by the courts and not by this Commission.

To require the railroad to acquire either tracks or trackage rights to handle livestock over track 1619 would amount in effect to requiring an extension of the railroad contrary to sections 1

(18) to 1 (22) which specifically provide that the Commission's authority shall not extend to the construction or abandonment of spur, industrial, team, switching, or sidetracks located or
61 to be located wholly within one State. Section 1 (9) relates to switch connections only and not to the extension of trackage rights over sidetracks. Compare Cleveland, C., C. & St. L. Ry. Co. v. United States, 275 U. S. 404, at pages 408 and 409.

Beginning September 14, 1907, complainant and certain other industries negotiated for a direct spur from the New York Central's main tracks at Sixty-third Street, thence south over Sixty-third Street and across private land of the Lake Erie Provision Company to complainant's plant. A city ordinance to cross Sixty-third Street was obtained on May 25, 1908, and in May 1909 the court condemned the private land, awarding $13,500 damages. This made the total estimated cost of the track about $24,500. The track was not built as the interested parties were unwilling to bear so great an expense. If that project had been consummated the use of track 1619 would not have been necessary in order for the New York Central to reach complainant's siding.

In view of the fact that track 1619 is owned by a private industry, not a common carrier by railroad, the Stock Yards is clearly within its legal rights in restricting the use of that track in such manner as to prevent Swift from interfering with the business of the Stock Yards.

It therefore follows that that track being privately owned and not having been condemned by any condemnation proceeding, the sole right of determining the use thereof remains in the Stock Yards. There is no jurisdiction in the Commission to require the Stock Yards to permit the New York Central to use the track for any purpose unless such use is agreeable to the Stock Yards.

In my opinion, the complaint should be dimissed.

I am authorized to state that COMMISSIONER PATTERSON joins in this expression.

SPLAWN, Commissioner, dissenting:

I dissent from the finding that there is a violation of section 3, because, in my opinion, the circumstances and conditions surrounding the transportation of livestock to Swift's private siding are not substantially similar to those surrounding the transportation of livestock to the private sidings of Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company. The plants of the latter companies are outside of the stockyards and are served by defendants without using tracks owned by the Stock Yards. In order to reach Swift's siding, defendants must use track 1619, which is owned by the Stock Yards Company, and whose use by defendants for the transportation

of livestock has been prohibited. No such prohibition exists with respect to the transportation of livestock to the plants of the three companies above named. This difference in circumstances and conditions precludes a finding under section 3. Nor do
62 I believe that the preference that may be caused by the permission to use track 1619 for all traffic except livestock is undue because complainant is clearly benefited by use of the track for switching its traffic other than livestock.

The finding of a violation of section 1 (6) is apparently based upon the conclusion that the provision of the contract between the Stock Yards Company and the New York Central excepting livestock is a "penalty" provision which changes and nullifies the laws under which the New York Central operates and that, therefore, the provision is of no legal force and effect. I am unable to agree with the finding or with the conclusion upon which it is based. Track 1619 is owned by the Stock Yards Company and is constructed on its land within the stockyards property. It has not been dedicated to the public, and therefore its use may be restricted, in whole or in part, by its owner. There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use. If it has such authority over the track, it seems to me that it has the right to restrict its use.

While section 1 (9) provides that the carrier shall operate switch connections with private sidetracks which may be constructed to connect with its railroad, there is no express language in the section requiring the operation of the sidetrack in instances where such operation is prevented by conditions not imposed by the carrier and beyond its control. This report does not contain conclusions of fact and findings on which it is possible to give complainant relief under section 1 (9).

COMMISSIONER AITCHISON did not participate in the disposition of this proceeding.

63 *Exhibit "B-1" to Complaint*

INTERSTATE COMMERCE COMMISSION

WASHINGTON, D. C.

JULY 25, 1946.

IN THE MATTER OF LETTER REQUEST OF DEFENDANTS FOR POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

Present: Claude R. Porter, Commissioner, to whom the above entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above entitled proceedings, and upon consideration of letter request of defend-

ants for postponement of the effective date of the order, and for good cause appearing:

It is ordered, that the order entered in said proceeding on May 3, 1946, which by its terms is made effective on or before August 30, 1946, upon not less than 30 days' notice, be, and it is hereby, modified to become effective on or before October 30, 1946, upon not less than 15 days' notice, instead of August 30, 1946.

(Sgd.) W. P. BARTEL,
Secretary, Interstate Commerce Commission.

64 *Exhibit "B-2" to Complaint*

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

OCTOBER 17, 1946.

IN THE MATTER OF TELEGRAPHIC REQUEST OF DEFENDANTS FOR POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

Present: Charles D. Mahaffie, Commissioner, to whom the above entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceedings, and upon consideration of telegraphic request of defendants for postponement of the effective date of the order, and for good cause appearing:

It is ordered, that the order entered in said proceeding on May 3, 1946, which was subsequently modified to become effective October 30, 1946, upon not less than 15 days' notice, be, and it is hereby, further modified to become effective November 30, 1946, upon like notice, instead of October 30, 1946.

(Sgd.) W. P. BARTEL,
Secretary, Interstate Commerce Commission.

65 *Exhibit "B-3" to Complaint*

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

NOVEMBER 13, 1946.

IN THE MATTER OF TELEGRAPHIC REQUEST BY DEFENDANTS FOR SHORTENING OF THE NOTICE REQUIRED BY THE ORDER

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceedings, and upon consideration of the telegraphic request

by defendants for shortening of the notice required by the order, and for good cause appearing:

It is ordered, that the order entered in said proceeding on May 3, 1946, which was subsequently modified to become effective November 30, 1946, upon not less than 15 days' notice, be, and it is hereby, further modified to become effective November 30, 1946, upon not less than 5 days' notice instead of 15 days' notice.

(Sgd.) W. P. Bartel,
Secretary, Interstate Commerce Commission.

67 *Exhibit "D" to Complaint*

Dated Cleveland, Ohio, Dec. 20, 1943

Supplemental Agreement to Sidetrack Agreement Dated June 16, 1924, Between the New York Central Railroad Company, Successor to and Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and the Cleveland Union Stock Yards Company

Whereas, on May 29, 1943, The Cleveland Union Stock Yards Company, called the Industry herein and in the agreement dated June 16, 1924, gave notice in writing to The New York Central Railroad Company Successor to and Lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, called the Railroad herein and in said agreement of June 16, 1924, under Section Sixth of said agreement, that said agreement would be terminated thirty (30) days thereafter, however, that all provisions of said agreement of June 16, 1924, as amended February 1, 1935, except Section Fourth thereof may be continued in full force and effect, provided that the Railroad would pay to the Industry rental for the occupancy of the Industry's land by any and all tracks located thereon belonging to the Railroad and for the restricted use of any and all tracks belonging to the Industry and located on its land, provided all of said tracks were maintained by the Railroad.

Now, therefore, for and in consideration of the mutual promises and covenants in said agreement dated June 16, 1924, and hereinafter set forth, the parties hereto agree as follows:

First: All provisions, except Sections Fourth and Sixth in said agreement of June 16, 1924 and Section Fourth as amended February 1, 1935, shall continue in full force and effect.

Second: Said Section Fourth in said agreement of June 16, 1924, as amended February 1, 1935, shall be and is hereby changed and modified, effective as of July 1, 1943, to read as follows:

"Fourth. The Railroad shall maintain all of said tracks, irre-

spective of ownership, and shall pay to the Industry the
68 sum of $425.00 per month in consideration for which the Industry shall and by this instrument does grant to the Railroad (a) the use and occupancy of its lands by any and all tracks or portions thereof located thereon belonging to the Railroad and such adjacent land as may be necessary for the ordinary use and occupancy of said tracks, and (b) the uninterrupted use and occupancy of any and all tracks belonging to the Industry and located on its land, together with such adjacent land as is necessary for the ordinary use and occupancy of said tracks for the transportation of any and all traffic, provided that such Industry owned tracks shall not be used or occupied for the purpose of transporting livestock to or from any place, establishment or facility except the Industry or in such a way as to unduly interfere with the Industry's business. In event said Industry owned tracks are used for said hereinabove described competitive traffic the charge therefor shall be the subject of a separate agreement.

All of said tracks are shown on the blueprint attached hereto and made a part hereof, entitled "Land and Tracks at Cleveland Union Stock Yards, Cleveland, Ohio, June 16, 1943—44173–11–P–7, on which tracks owned by the Railroad are colored red and tracks owned by the Industry are colored yellow.

Third: Said Section Sixth in said agreement of June 16, 1924, shall be and is hereby changed and modified, effective as of July 1, 1943, to read as follows:

"Sixth. This agreement shall terminate six months after written notice by registered mail has been sent by either party to
69 the other to that effect; in the event such mail notice is returned undelivered notice by the Railroad may be given by posting it upon a conspicuous part of the premises and this agreement, in such case, shall terminate six months after such notice is given, after which period either party may remove all property belonging to it under this agreement, except as herein otherwise provided."

In Witness Whereof, the parties hereto have caused this agreement to be executed in duplicate the day and year first above written.

THE NEW YORK CENTRAL
RAILROAD COMPANY,
Lessee of The Cleveland, Cincinnati,
Chicago & St. Louis Railway Company,
By W. F. SCHAFF.

THE CLEVELAND UNION STOCK
YARDS COMPANY,
By (S) A. Z. BAKER, *President.*

Approved as to form

W. N. KING,
General Attorney,
The N. Y. C. R. R. Co.

FFR.

70 *Exhibit "E" to Complaint*

THE CLEVELAND UNION STOCKYARDS CO.
CLEVELAND, OHIO

NOVEMBER 15th, 1946.

A. Z. BAKER,
President and Gen. Mgr.
PHILIP H. COAD,
Secretary and Treasurer.
MR. R. R. PIERCE,
Gen. Atty., The New York Central Railroad Co.,
1324 W. 3rd St., Cleveland, Ohio.

DEAR SIR: For a number of years The Cleveland Union Stock Yards Company has by conventional sidetrack agreements granted to The New York Central Railroad Company and predecessors the use of the industrial sidetracks owned by the Stock Yards Company and serving its stockyards, for such purposes as storing and switching cars and the movement of carload freight to and from Swift & Company and other packers located adjacent to the stockyards property.

By an agreement of February 1st, 1935, amending an agreement of June 16th, 1924, The Cleveland Union Stock Yards Company restricted the use of its tracks for competitive traffic (meaning livestock delivered other than through its stockyards). By further supplemental agreement of July 1st, 1943, the Stock Yards Company granted to the Railroad Company "the uninterrupted use and occupancy of any and all tracks belonging to the Industry and located on its land, together with such adjacent land as is necessary for the ordinary use and occupancy of said tracks, for the transportation of any and all traffic, provided, that such Industry-owned tracks shall not be used or occupied for the purpose of transporting livestock to or from any place, establishment or facility save the Industry, or in such a way as to unduly interfere with the Industry's business. In the event such Industry-owned tracks are used for the heretofore described competitive traffic, the use therefor will be the subject of a separate agreement."

The Stock Yards Company is engaged in the business of handling, storing, and delivering livestock, including livestock con-

signed direct to Swift & Company and other packers, in connection with which it has provided and maintains pens, alleys, railroad sidetracks, and other necessary facilities, and for the use of which it derives revenue based upon rates approved by the Secretary of Agriculture or upon agreements covering nonstockyard services. As a public stockyard it must provide facilities to accommodate all reasonable peaks of volume of livestock received from the Railroad Company for delivery to packers through its stockyards. The charges for the use of these facilities in the delivery of livestock, when such delivery is made within 24 hours, average $3.73 per car. If livestock should be diverted from the pens of the Stock Yards Company for delivery by the use of its sidetrack, it would deprive the Stock Yards Company of compensation for the facilities, which would as a consequence remain idle. The Company could not long remain in business under such circumstances.

71 The Stock Yards Company has been willing to permit the use of its tracks for the movement of freight other than livestock, since that does not unduly interfere with its business. The Interstate Commerce Commission, in Docket 28714, Swift & Company vs. Baltimore & Ohio R. R. Co., et al., in which the Stock Yards Company is held to be a proper party defendant has condemned the agreement between the Stock Yards Company and the Railroad Company because it attempted a special exception as to livestock, which the Commission considered to be an abrogation of the obligation placed upon the railroad by the Interstate Commerce Act. The Commission also condemned the singling out of livestock for special compensation, and the collection by the Stock Yards Company or the payment by the Railroad Company of either yardage charges or any other amount of special compensation, which the Commission considered in effect a demand from the Railroad or a penalty for observing its tariff and other duties under the law, pointing out that "whatever may be the Stock Yard's right to altogether withdraw this track from public use * * * it may not, so long as contracting for its public use, exact compensation on any such basis."

Elsewhere in the Commission's decision, the Commission said, "Whatever may be the right of the Stock Yard Company to altogether withdraw its track from public use * * * the attempted special exception as to livestock could not and has not changed the common carrier status of New York Central Spur No. 245." The Commission found that "Track 1619 (owned by the Stock Yards Company) is now and for years has been devoted to a public use." There is no finding by the Commission that the track had been dedicated to public use in such manner as to create a perpetual easement or prescriptive right in the public, in the railroads, in Swift & Company, or in any other individual firm or

corporation. The Commission recognized the fact that the use had been entirely under contract. There is, of course, a marked distinction between "devoted to public use" and "dedicated to public use." The former is temporary and subject to withdrawal—the latter is fixed and permanent. The Cleveland Union Stock Yards Company has not desired and does not now desire nor intend to create a permanent use of its track and the land occupied thereby. The particular track extends along West 65th Street in the City of Cleveland, Ohio, and occupies the most valuable land frontage owned by the Stock Yards Company. That property and the business of The Cleveland Union Stock Yards Company must be protected. The Commission's decision apparently makes it necessary to withdraw the use of so-called track No. 1619 (or No. 245) by the Railroad for the purpose of serving Swift & Company or other plants similarly situated. The decision seems to recognize the lawful right of the Stock Yards Company to altogether withdraw its track from this use.

The supplemental agreement of July 1st, 1943, provides, "Sixth. This agreement shall terminate six months after written notice by either party to the other to that effect, such notice on the
72 part of the Railroad shall at its option be given by posting it on a conspicuous part of the premises, and this agreement shall terminate six months after posting, after which period either party may remove all property belonging to it under this agreement except as herein otherwise provided."

For reasons herein set forth, The Cleveland Union Stock Yards Company under and by virtue of the termination provision set forth above, hereby notifies you that the said side track agreement of June 16th, 1924, as amended February 1st, 1935, and further amended July 1st, 1943, is terminated as of midnight of the 16th day of May, 1947, after which you shall make no further use of said sidetrack for the transportation of freight of any kind or nature to Swift & Company or other industries similarly situated which have heretofore enjoyed transportation service by means thereof.

Yours very truly,

THE CLEVELAND UNION
STOCK YARDS CO.,
By (Sgd.) A. Z. BAKER,
President & General Manager.

AZB–W.

Receipt of this letter is acknowledged this 15th day of November 1946.

Chief Assistant General Attorney,
The New York Central Railroad Company.

73 In United States District Court

Civil No. 24435

[Title omitted.]

Answer of the United States

Filed Jan. 20, 1947

Now comes the United States of America, defendant in the above-entitled civil action, and for answer to the Bill of Complaint filed herein by plaintiffs on November 20, 1946, joins in and adopts the Answer heretofore filed by the Interstate Commerce Commission.

Edward J. Hickey, Jr.,
EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.

Wendell Berge,
WENDELL BERGE,
Assistant Attorney General.

Don C. Miller,
DON C. MILLER,
United States Attorney.

74 CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the attached answer was served on January 16, 1947, upon each of the other parties to this action by depositing a copy in the United States mails, postage prepaid, addressed to each of the following attorneys and representatives at his respective address as follows: Dwight D. Buss, Esquire, Counsel, Baltimore & Ohio Railroad Company, 1956 Union Commerce Building, Cleveland, Ohio; George H. P. Lacey, Esquire, Counsel, Pennsylvania Railroad Company, 1857 Union Commerce Building, Cleveland, Ohio; Willis T. Pierson, Esquire, Law Department, Erie Railroad Company, Midland Building, Cleveland, Ohio; John A. Duncan, Esquire, Wheeling and Lake Erie Ry. Company, 1669 Union Commerce Building, Cleveland, Ohio; Robert R Pierce, Esquire, Chief Assistant General Attorney, New York Central Railroad Company, 1324 W. Third Street, Cleveland, Ohio; Edward M. Reidy, Esquire, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C., Ross Dr. Rynder, Esquire, John P. Staley, Esquire, Attorneys for Swift & Company, Intervenor, 4115 Packers Avenue, Chicago 9, Illinois.

Edward J. Hickey, Jr.,
EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.

JANUARY 16, 1947.

75 In United States District Court

Civil No. 24435

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Jan. 10, 1947

The Interstate Commerce Commission, hereinafter called the Commission, a defendant in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraph (a) of section I of the complaint, the Commission admits that the suit is brought by plaintiffs to enjoin and set aside the report and orders therein referred to and admits that the copies of said report and orders, annexed to the complaint as Exhibits A, B-1, B-2, and B-3, are correct, except that it says that a copy of the Commis-
76 sion's order of May 3, 1946, not having been made a part of the complaint, is attached to this answer as Exhibit 1, to which the Commission refers the Court.

Answering the allegations of paragraph (b) of section I of the complaint, the Commission denies any "unlawful effect" of its order therein referred to.

Answering the allegations of paragraph (c) of section I of the complaint, the Commission alleges that the present effective date of its order of May 3, 1946, as extended from time to time, is February 28, 1947, upon "not less than 5 days' notice."

II

Answering the allegations of sections II, III, and IV, of the complaint, the Commission admits the allegations thereof.

III

Answering the allegations of section V of the complaint, the Commission refers the Court to the complaint of Swift & Company, complainant before the Commission, for a more full, complete and accurate statement of the position of that Company than is contained in said section V.

IV

Answering the allegations of section VI of the complaint, the Commission admits that the position of plaintiffs was substantially as set forth in said section VI, but denies that said section VI, or the separate paragraphs thereof, adequately or correctly summarizes the facts of record in said proceeding before the Commission. For a more full and complete statement of the facts and contentions made by the respective parties, including plaintiffs herein, to the Commission, the Commission respectfully refers the Court to its said report of May 3, 1946, attached
77 to and made a part of the complaint as Exhibit A, to which reference is hereby made. The Commission further avers that said decision and findings of the Commission are based upon all of the facts of record in said proceeding and that said decision is valid ans lawful and its findings and conclusions are sustained by substantial evidence.

Answering further the allegations of section VI of the complaint, the Commission avers and alleges that the portion of track therein referred to as owned by the Cleveland Union Stockyards Company is a part of the tracks of the New York Central Railroad Company, operated by the latter subject to the provisions of the Interstate Commerce Act; that, under contracts with the said Stock Yards, the New York Central has for years used, and still is using, the track as part of its railroad and terminal facilities at Cleveland; that the agreed, as well as actual, use, has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New York Central's terminal track by which it renders common carrier switching service to and from the plant of Swift & Company and the several other plants and industries served thereby; that, while by amendment to the contracts made in 1935, restrictions, or conditions, were specially imposed as to the carriage of livestock, the use of the Stock Yard's track for all other traffic was continued just as formerly; that the Stock Yards, in contracting with the New York Central, presumably knew that it was dealing with a common carrier subject to regulatory laws; and that, as stated in the Commission's report (p. 65), "To say that the Stock Yards, while granting the use of its track 1619 generally for common carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by special provisions in their contract, change and nullify the laws under which the latter operates."

78 V

Answering the allegations of section VII of the complaint, the Commission refers the Court to its order of May 3, 1946, attached to and made a part of this answer as Exhibit 1, for more full and complete information concerning its requirements than is contained in said section VII. The Commission further avers, in answer to the allegations of this section, that the order is presently effective on February 28, 1947, on not less than 5 days' notice, and not on November 30, 1946, as set forth in said section VII.

VI

Answering the allegations of paragraphs (a) to (d) (first paragraph), inclusive, of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (1) (a) of section VIII of the complaint, the Commission denies the same. In this connection the Commission alleges and avers that the Cleveland Union Stock Yards Company was a defendant in the proceedings before the Commission and is bound by the terms of the order the same as any other defendant named therein, including plaintiffs.

Answering the allegations of paragraph (d) (1) (b) of section VIII of the complaint, the Commission denies the same. In this connection the Commission alleges and avers that the evidence of record in the proceedings before it, as well as its report in said proceeding, Exhibit A to the complaint, shows that the said 1,619 feet of track is maintained and operated by the New York Central Railroad Company, one of the plaintiffs herein. In this

79 connection, the Commission alleges and avers that, under the conditions established in the proceedings before it and set forth in its report of May 3, 1946, to which reference has hereinbefore been made, it is the lawful duty of plaintiffs herein, and of said Cleveland Union Stock Yards Company, to comply with said order of the Commission, it being a lawful order.

Answering the allegations of paragraph (d) (1) (c) of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (1) (d) of section VIII of the complaint, the Commission is without knowledge or information sufficient to form a belief as to the truth of the facts therein contained, the notice referred to having been issued after the close of the proceedings before the Commission. Further answering the said allegations, the Commission says that, in performing its duties of regulating rates, practices, and service, it is constantly dealing with railroad lines or trackage, both road-haul

and terminal, that include trackage held under lease, or trackage agreements, and where, too, the leases, or agreements, may contain a provision for termination upon specified notice, or the termination date may be within the comparatively near future; that it may not, because of such considerations, abdicate its duties but must enforce the Act's provisions under the existing conditions as to leasehold or trackage rights; that, similarly here, while the agreement between the Stock Yards and New York Central contained a clause authorizing termination by either party upon 60 days' notice, this did not afford excuse for permitting continuance of the violations of the Act shown; nor did it obligate the Commission to attempt to anticipate what the parties might in the future do under the termination clause, or as to just what were their rights in that respect.

80 Answering the allegations of paragraph (d) (1) (e) of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (2) of section VIII of the complaint, the Commission denies the same and refers the court to its report and order of May 3, 1946, for more full and complete information concerning its finding and conclusions.

Answering the allegations of paragraphs (d) (2) (a), (b), and (c), of section VIII of the complaint, the Commission denies the truth of each and every allegation therein contained, except insofar as said paragraphs constitute mere excerpts from the report of the Commission in said proceeding. The Commission further avers that the allegations of said paragraphs are merely argumentative and not proper parts of the complaint herein.

Answering the allegations of paragraph (d) (2) (d) of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (3) of section VIII of the complaint, the Commission denies the same, and avers that said paragraph is purely argumentative and that the decisions cited therein in nowise relate to delivery of livestock or other traffic to the plant of Swift & Company at Cleveland, Ohio.

Answering the allegations of paragraph (d) (3) (a) of section VIII of the complaint, the Commission denies the same.

Answering the allegations of paragraph (d) (3) (b) of section VIII of the complaint, the Commission denies the same. In this connection, the Commission avers that failure of defendants to comply with said order of the Commission would subject Swift & Company to undue prejudice and disadvantage, as found by the Commission in its report of May 3, 1946, and that such

81 questions are administrative in nature, within the sole authority of the Commission to make findings with respect thereto.

Answering the allegations of paragraphs (d) (4) (a), (b), and (c) of section VIII of the complaint, the Commission denies the same. In this connection the Commission avers that the question of violation of section 3 of the Act is primarily administrative and committed to the Commission's determination; that the Stock Yards, in contracting with the New York Central for the use of the track referred to, was dealing with a common carrier subject to regulatory laws; that whatever the Stock Yards' right to altogether withdraw its track from public use (which question was neither involved nor decided), it could not, while continuing to grant the use thereof generally for public service, single out particular traffic and, under the guise of a contract restriction or condition, force the railroad to refuse to switch and make delivery of such traffic as billed and as was its duty under the Act, or, in the alternative, to pay a special charge set up as in effect penalty for observing its tariffs and other duties under the laws to which it was subject; that that was not a lawful exercise by the Stock Yards of its rights in the track; that the railroad's acquiescence therein did not change this; that, therefore, the Stock Yards' asserted right to impose such special restrictions was not a cir-

82 sumstance which, as matter of law, rendered substantially different the circumstances and conditions in switching and making delivery of livestock to the plant of Swift & Co., than were the circumstances and conditions in rendering like service to its competitors; and that, consequently, since no lawful condition within the right of the Stock Yards to impose precluded the railroad from rendering such service for Swift & Co., it is obvious that the question of whether its failure to do so was unduly prejudicial was left as a purely administrative question committed to the judgment and determination of the Commission.

Answering the allegations of paragraphs (d), (5), (6), (7), (8), and (9), the Commission denies the same. The Commission further denies that its said report and order of May 3, 1946, is invalid for any of the reasons set forth in said paragraphs, or for any other reason or reasons.

Further answering the allegations of the complaint, the Commission admits and alleges that it made and entered the report and order of May 3, 1946 (266 I. C. C. 55), referred to in section I of the complaint and made a part thereof as Exhibit A, in a proceeding then pending before it, entitled Docket No. 28714, Swift & Co. v. Baltimore & Ohio Railroad Company et al., follow-

83 ing complaint filed with it on September 5, 1941, by Swift & Company as alleged in section V of the complaint; that thereafter answers were filed to said complaint by some of the defendants named therein; that thereafter the proceedings came on for formal hearing at Cleveland, Ohio, on April 22, 1942,

before Examiner Carter, at which hearing much oral testimony and other evidence in the form of exhibits was introduced by the respective parties; that thereafter briefs were filed by the parties with the Commission in support of their respective contentions; that thereafter, on or about April 1, 1943, a proposed report was served by Examiner Carter, recommending dismissal of Swift & Company's complaint, to which exceptions were filed by Swift & Company and a reply to said exceptions filed by the railroad defendants in the proceedings; that thereafter oral argument was had before the Commission on June 4, 1943; that by order of June 14, 1943, the proceeding was reopened for further hearing by the Commission whereupon further hearings were held before Examiner Haden at Cleveland on June 22, 1944, at which much further oral testimony and other evidence in the form of exhibits was introduced; that thereafter briefs on the rehearing were filed with the Commission by complainant, Swift & Company, and the railroad defendants; that thereafter, on or about May 26, 1945, a proposed report was served by Examiners Haden and Banks, again recommending dismissal of the complaint of Swift & Company, to which exceptions were filed by Swift & Company, and replies to said exceptions were filed by defendants railroads and defendant Cleveland Union Stock Yards Company; that thereafter the case came on for reargument before the Commission on October 3, 1945, following which the Commission made and entered and served upon all parties to said proceedings its said report of May 3, 1946, and its said order of the same date. The Com-

84 mission further alleges that following the issuance of said report and order of May 3, 1946, petition for reconsideration was filed with the Commission by defendant, Cleveland Union Stock Yards Company, to which a reply to said petition was filed by Swift & Company, and subsequently petition for reconsideration of said decision of May 3, 1946, was filed with the Commission by the railroad defendants in said Docket No. 28714, to which full reply was made by complainant, Swift & Company, following which the entire Commission, by order of October 7, 1946, denied said petitions for reconsideration filed by railroad defendants and defendant Cleveland Union Stock Yards Company. The Commission further alleges that by subsequent orders said order of May 3, 1946, had been from time to time extended so that its present effective date is February 28, 1947, on five days' notice.

The Commission admits and alleges that in said proceedings the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said report and order were submitted to the Commission for

consideration, including testimony and other evidence submitted on behalf of plaintiffs herein by their counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the plaintiffs herein, its said report and order of May 3, 1946, 266 I. C. C. 55, annexed to and made part of the complaint as Exhibit A; that
85 said report and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which its order of May 3, 1946, was based.

The Commission further alleges that the findings and conclusions of said report were and are, and that each of them was and is fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and conditions called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order of May 3, 1946, were not mad or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint. The Commission denies that its said orders are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said complaint, or for any other reason or reasons. The Commission denies that its said order causes, or will cause, plaintiffs either irreparable damage or any damage if said report and order are not enjoined.

For a further defense herein, defendant Commission alleges that the Cleveland Union Stock Yards Company was a defendant
86 in said proceeding before the Commission, having been made so under the provisions of U. S. C. A. title 49, § 42; that said order of the Commission applies to said Cleveland Union Stock Yards Company to the same extent and subject to the same provisions of law, including penalties, as it applies to plaintiffs in this complaint; and that said Cleveland Union Stock

Yards Company may not lawfully disobey said order or aid, abet, or induce disobedience to said order by the plaintiffs herein.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order referred to and made a part of the complaint as Exhibit A, which report and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By E. M. REIDY,
Assistant Chief Counsel.
GORDON C. LOCKE,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

87 [*Duly sworn to by J. Haden Alldredge; jurat omitted in printing.*]

88 *Exhibit 1 to Answer*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of May, A. D. 1946

No. 28714

SWIFT & COMPANY
v.

THE BALTIMORE AND OHIO RAILROAD COMPANY; ERIE RAILROAD COMPANY (ROBERT E. WOODRUFF AND JOHN A. HADDEN, TRUSTEES); THE NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE WHEELING AND LAKE ERIE RAILWAY COMPANY; THE CLEVELAND UNION STOCK YARDS COMPANY, AND LIVESTOCK TERMINAL SERVICE COMPANY

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been

made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and having found that the present practice of defendants in refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried over their lines and consigned thereto is in violation of section 3 (1), section 1 (6) and section 1 (9) of Part I of the Interstate Commerce Act, and having made the other findings required by said paragraph:

It is ordered, that the above-named defendants, or either of them, be, and they are hereby notified and required to cease and desist, on or before the 30th day of August, 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

It is further ordered, that said defendants, or either of them, be, and they are hereby, notified and required to establish and put in force, on or before the 30th day of August, 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipment of livestock carried over defendants' lines and consigned thereto.

And it is further ordered, that this order shall remain in full force and effect until the further order of the Commission.

By the Commission.

[SEAL] (S) W. P. BARTEL, *Secretary.*

89 In the United States District Court

Civil No. 24435

(Title omitted.)

Answer of Swift & Company, intervener

Filed Jan. 20, 1946

Now comes Swift & Company, hereinafter referred to as the intervener, and, for its separate answer to plaintiffs' complaint herein, alleges and says:

I

(a) Intervener admits the allegations contained in section I (a) of the complaint.

(b) Intervener admits so much of the allegations of section I (b) of the complaint as avers that a copy of the report and order of the Interstate Commerce Commission (hereinafter called the Commission) in No. 28714, Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55, are appended to the complaint; but denies that sections VII and VIII of the complaint set forth any unlawful effect of said order of the Commission.

(c) Intervener admits the allegations of section I (c) of the complaint, except that intervener avers that, by its order of November 22, 1946, the Commission further extended the effective date of its order in said proceeding so as to become effective February 28, 1947, upon not less than five days' notice.

II

Intervener admits the allegations of section II of the complaint.

90

III

Intervener admits the allegations of section III of the complaint.

IV

Intervener admits the allegations of section IV of the complaint.

V

Intervener denies that section V of the complaint sets forth truly, accurately, adequately, or correctly the position of intervener in said proceeding before the Commission; on the contrary, intervener avers that the allegations of section V of the complaint constitute merely a self-serving summarization by plaintiffs of the complaint of intervener in said proceeding before the Commission; and intervener further avers that, if plaintiffs desire to plead said complaint before the Commission as a part of their complaint herein, they should do so by attaching a true and correct copy thereof to their complaint herein. Intervener further avers that a true and complete understanding of the position of intervener in said proceeding before the Commission can be obtained only from the entire record before the Commission and the Commission's decision in said proceeding.

VI

Intervener admits that the position of plaintiffs in the proceeding before this court is set forth in said section VI of their com-

plaint; but denies that said section VI adequately or correctly summarizes the facts of record in said proceeding before the Commission; and for a more full and complete summarization of said facts intervener refers to said decisions and order of the Commission attached to plaintiffs' complaint herein as exhibit A. Intervener avers that said decision of the Commission is based upon all of the facts of record in said proceeding and that said decision is valid and lawful if said decision is sustained by substantial evidence. Intervener further avers that the allegations set forth in said section VI of the complaint constitute no legal basis upon which the court may enjoin or annul the order of the Commission in said proceeding.

91

VII

Intervener denies that the order of the Commission in said proceeding is accurately quoted in section VII of the complaint herein and, for a true and complete copy of said order, refers to exhibit A attached to plaintiff's complaint herein.

VIII

(a) Intervener denies the allegation of section VIII (a) of the complaint herein that said report and order of the Commission contain findings and requirements which transcend the constitutional and statutory powers of the Commission and misinterpretations and misapplications of the law which would subject plaintiffs herein to irreparable damages and penalties.

(b) Intervener denies that said report and order of the Commission contain findings which are not supported by substantial evidence in the record; denies that there is no rational basis to support certain conclusions in said report and order; and denies that the evidence of record before the Commission in said proceeding is totally or otherwise insufficient to support the ultimate findings and conclusions of the Commission and the order based thereon.

(c) Intervener denies that, in reaching the conclusions stated in said report, the Commission has totally, partially, or in any particular disregarded the evidence offered by plaintiffs herein; denies that the Commission has arbitrarily or capriciously based its findings upon arguments and assertions made by complainant in said proceeding before the Commission; and denies that the findings of the Commission in said report are unsupported by substantial evidence.

92

(d) Intervener denies that, in reaching its conclusions and in making its findings in said proceeding, the Commission acted ar-

bitrarily and unreasonably respecting important facts, or any facts, established by defendants.

(1) Intervener denies that said report and order of the Commission are void and of no effect because of the impossibility of carrying it into effect; denies that said order of the Commission would require plaintiffs to commit an act of unlawful trespass upon the property of others and thereby subject plaintiffs to further litigation and irreparable damages; and denies that said order of the Commission requires an impossible performance by plaintiffs herein, for the failure of which performance plaintiffs herein, their officers, representatives, or agents would be subjected to heavy and irretrievable penalties under section 16 (8) of the Interstate Commerce Act, U. S. C. A. title 49, § 16, par. (8); or any other law. On the contrary, intervener avers that the Cleveland Union Stock Yards Company was a defendant in said proceeding before the Commission and that said Cleveland Union Stock Yards Company is bound by the terms of said order to the same extent as the plaintiffs herein.

(a) Intervener further denies that said 1,619 feet of track is not controlled by plaintiffs herein and avers that, on the contrary, the evidence of record in said proceeding before the Commission, as well as the report of the Commission in said proceeding,
93 shows that the said 1,619 feet of track is controlled by one of the plaintiffs herein, to wit, The New York Central Railroad Company.

(b) Intervener denies that the order of the Commission would require plaintiffs herein to trespass upon the land and 1,619 feet of track owned and controlled by one of the defendants before the Commission in said proceeding, to wit, the Cleveland Union Stock Yards Company; and denies that said land and said 1,619 feet of track are controlled by said Cleveland Union Stock Yards Company. Intervener denies that said land and 1,619 feet of track cannot be used for the purpose required in the order or for any reason set forth in the complaint herein. Intervener avers that, on the contrary, under the conditions established in the record before the Commission in said proceeding and set forth in the report of the Commission herein, it is the lawful duty of the plaintiffs herein, as well as of said Cleveland Union Stock Yards Company, to comply with said order of the Commission.

(c) Intervener denies all of the allegations of section VIII (d) (1) (c) of the complaint herein.

(d) Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in section VIII (d) (1) (d) of the complaint herein. Intervener avers, however, that, if said allegations as to a notice in writing, dated November 15, 1946, are true, it would merely indicate that the

Cleveland Union Stock Yards Company, one of the defendants in said proceeding before the Commission and against whom the Commission's order runs, is seeking unlawfully to evade compliance with said order and to aid, abet, and induce violation of said order of the Commission.

94 (e) Intervener denies each and every allegation contained in section VIII (d) (1) (e) of the complaint.

(2) Intervener denies each and every allegation contained in section VIII (d) (2) of the complaint herein.

(a) (b) (c) Intervener denies each and every allegation contained in section VIII (d) (2) (a), (b), and (c) of the complaint except insofar as said allegations constitute mere copies of disconnected portions of the report of the Commission in said proceeding, and avers that said section is purely argumentative and forms no proper part of the complaint herein.

(d) Intervener denies each and every allegation contained in section VIII (d) (2) (d) of the complaint herein.

(3) Intervener denies each and every allegation contained in section VIII (d) (3) of the complaint herein. Intervener avers that said section of said complaint is purely argumentative and that the decisions cited therein in nowise relate to delivery of livestock or other traffic to intervener's plant at Cleveland, Ohio. Intervener further avers that, prior to said decision of the Commission and prior to the filing of the complaint in this court, said plaintiffs had published and filed with the Commission a tariff known as W. S. Curlett's tariff I. C. C. No. A–833, effective January 1, 1946; that said tariff is applicable to deliveries of livestock and all other freight to intervener's plant at Cleveland, Ohio, as well as to other deliveries of freight at Cleveland, Ohio; and that said tariff has been accepted by the Commission as giving effect to the principles announced by it in the decisions

95 cited or quoted by plaintiffs in section VIII (d) (3) of the complaint herein. A true and correct copy of said W. S. Curlett's tariff I. C. C. No. A–833 is attached to this answer and marked exhibit "A," and a duly certified copy thereof will be presented to the court upon the trial of this case.

(a) Intervener denies each and every allegation contained in section VIII (d) (3) (a) of the complaint herein.

(b) Intervener denies each and every allegation contained in section VIII (d) (3) (b) of the complaint herein. Intervener avers that, on the contrary, failure to comply with said order of the Commission would subject intervener to undue prejudice and disadvantage in and to the extent and for the reasons stated by the Commission in its report in said proceeding.

(4) Intervener denies each and every allegation contained in section VIII (d) (4), (a), (b), and (c) of the complaint herein.

Intervener avers that said allegations are purely argumentative and fail to indicate any unlawful conclusion or finding by said Commission.

(5) Intervener denies each and every allegation of section VIII (d) (5) of the complaint herein.

(6) Intervener denies each and every allegation of section VIII (d) (6) of the complaint herein.

(7) Intervener denies each and every allegation of section VIII (d) (7) of the complaint herein.

(8) Intervener denies each and every allegation of section VIII (d) (8) of the complaint herein.

(9) Intervener denies each and every allegation of section VIII (d) (9) of the complaint herein.

96 IX

For a further defense herein intervener alleges that the Cleveland Union Stock Yards Company was a defendant in said proceeding before the Commission, having been made so under the provisions of U. S. C. A. title 49, § 42; that said order of the Commission applies to said Cleveland Union Stock Yards Company to the same extent and subject to the same provisions of law, including penalties, as it applies to plaintiffs in this complaint; and that said Cleveland Union Stock Yards Company may not lawfully disobey said order or aid, abet, or induce disobedience to said order by the plaintiffs herein.

Wherefore, having fully answered the complaint, intervener prays that the relief therein prayed be denied and that the complaint be dismissed with costs to the intervener and that the intervener have the benefit of such other and further orders, decrees, or relief as may be just and proper.

John P. Staley,
JOHN P. STALEY,
Ross Dean Rynder,
ROSS DEAN RYNDER,
Attorneys for Swift & Company,
4115 Packers Avenue, Chicago 9, Illinois.

DECEMBER 24, 1946.

97 *Exhibit "A" to answer*

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-833	154-A	Ill. C. C. A-2, Ind. R. C. A-2, P. S. C.-Md. A-33, P. U. C.-N. J. A-29, P. S. C.-N. Y. A-146, Pa. P. U. C. A-12, Vt. P. S. C. A-26, Va. C. C. A-66, P. S. C.-W. Va. A-[illegible]
I. N. Doe	532	53-A	Conn. P. U. C. 12, Maine P. U. C. 47, M. D. P. U. [illegible], N. H. P. S. C. 40, P. S. C.-N. Y. 61, R. I. P. U. A. [illegible], Vt. P. S. C. 41.
B. T. Jones	4002	632	Ill. C. C. 542, Ind. R. C. D-750, K. R. C. 93, Mich. P. S. C. 684, P. S. C.-N. Y. 272, Ohio 2150, Pa. P. U. C. [illegible], P. S. C.-W. Va. 291.
R. G. Raasch	600	.....	Ill. C. C. 300, Ind. R. C. 154, P. S. C. Mo. 69.

(For cancellations, see page 2 herein)

W. S. Curlett, I. N. Doe, B. T. Jones, and R. G. Raasch, Agents

LOCAL FREIGHT TARIFF OF RULES GOVERNING RECEIPT AND DELIVERY OF CARS OF FREIGHT (EXCEPT COAL AT MINES, BREAKERS AND WASHERIES, IRON ORE AT MINES, BEEHIVE COKE OVENS, AND TRAFFIC AT THE DOCK WHERE SUCH TRAFFIC IS INTERCHANGED WITH WATER CARRIERS)

ON, TO, AND/OR FROM PRIVATE TRACKS AND INDUSTRIAL TRACKS SERVED BY CARRIERS SHOWN ON PAGES 2 TO 9 HEREIN

Issued September 28, 1945. Effective November 1, 1945.

B. T. Jones, Agent, 608 South Dearborn Street, Chicago 5, Ill.

R. G. Raasch, Agent, 236 Union Station Building, 516 W. Jackson Boulevard, Chicago 6, Ill.

I. N. Doe, Agent, Room 524, South Station, Boston 10, Mass.

Issued by W. S. Curlett, Agent, 143 Liberty Street, New York 6, N. Y.

98 CANCELLATIONS

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-830	154	Ill. C. C. A-1, Ind. R. C. A-1, P. S. C.-Md. A-32, P. U. C.-N. J. A-28, P. S. C.-N. Y. A-144, Pa. P. U. C. A-128, Vt. P. S. C. A-25, Va. C. C. A-65, P. S. C.-W. Va. A-[illegible]
I. N. Doe	531	52	Conn. P. U. C. 12, Maine P. U. C. 46, M. D. P. U. [illegible], N. H. P. S. C. 39, P. S. C.-N. Y. 60, R. I. P. U. A. [illegible], Vt. P. S. C. 40.
B. T. Jones	3992	.....	Ill. C. C. 541, Ind. R. C. D-748, K. R. C. 92, Mich. P. S. C. 683, P. S. C.-N. Y. 271, Ohio 2148, Pa. P. U. C. 311, P. S. C.-W. Va. 290.
R. G. Raasch	594	.....	Ill. C. C. 297, Ind. R. C. 153, P. S. C. Mo. 68.

LIST OF CARRIERS

Name of carrier	Powers of attorney and concurrences issued to—																						
	W. S. Curtlett, Agent						B. T. Jones, Agent						R. G. Rasch, Agent			I. N. Doe, Agent							
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. FI No.	P. S. C. Md. F Md. 1 No.	P. S. C. N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C. N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C. N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Akron & Barberton Belt Railroad Company, The	FX7, No. 1																						
Akron, Canton & Youngstown Railroad Company, The							109																
Aliquippa and Southern Railroad Company	FX9, No. 1					6																	
Alton and Southern Railroad	FX7, No. 12																						
Alton Railroad Company, The (Henry A. Gardner, Trustee)							30	22															
Ann Arbor Railroad Company, The							116			41													
Arcade and Attica Railroad Corporation	75				36																		
Aroostook Valley Railroad Company																27	10						
Baltimore and Annapolis Railroad Company, The	FX7, No. 6			8																			
Baltimore and Eastern Railroad Company	35			18																			
Baltimore and Ohio Railroad Company, The	189			30	34	36																	
Baltimore and Ohio Chicago Terminal Railroad Company, The													77	27	26								
Barre and Chelsea Railroad Company																23							
Belfast & Moosehead Lake Railroad Company																29	13						

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						B. T. Jones, Agent						R. G. Rasch, Agent			I. N. Doe, Agent							
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. FI No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. FI No.	Pa.-P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C.-N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.	
Belt Railway Company of Chicago, The													88	33									
Bessemer and Lake Erie Railroad Company							70																
Boston and Maine Railroad																84	12	10	8	36		3	
Boyne City Railroad Company							6			5													
Buffalo Creek Railroad Company (Erie Railroad Company and Lehigh Valley Railroad Company, Lessees)	FX7, No. 1				1																		
99 Canadian National Railways (Lines West Fort William, Ont., Armstrong, Ont., and East thereof)							E60																
Canadian Pacific Railway Company (Lines West, Fort William, Fort William, Ont., and East thereof)																E15							
Canton Railroad Company	FX7, No. 11			13																			
Castleman River Railroad Company, The	FX7, No. 2																						
Central Indiana Railway Company							67		33														
Central Railroad Company of New Jersey, The (Shelton Pitney and Walter P. Gardner, Trustees)	99					86																	

Central Vermont Railway, Inc.																		21		7			4
Chestnut Ridge Railway Company	77					35																	
Chicago and Calumet River Railroad Company	FX7, No. 24																						
Chicago & Illinois Western Railroad	79	66A																					
Chicago & Western Indiana Railroad Company															31	20							
Chicago, Aurora and Elgin Railroad Company (Arthur L. Schwartz, Trustee)							89	72															
Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee)															CJ 25	CJ 16							
Chicago North Shore and Milwaukee Railroad Company (John B. Gallagher and Edward J. Quinn, Trustees)							86																
Chicago River and Indiana Railroad Company, The							13	11															
Chicago Short Line Railway Company															73	33						45	
Chicago, South Shore and South Bend Railroad							84	26	26														
Chicago, West Pullman & Southern Railroad Company															33	30							
Conemaugh & Black Lick Railroad Company	FX8, No. 1					19																	
Cornwall Railroad Company	81					40																	
Cumberland and Pennsylvania Railroad Company	68			31																			
Curtis Bay Railroad Company	FX9, No. 1			1																			
Cuyahoga Valley Railway Company, The							20																
100 Delaware and Hudson Railroad Corporation, The	20				19	17																	
Delaware, Lackawanna and Western Railroad Company, The	77				46	40																	
Delray Connecting Railroad	FX7, No. 1																						
Detroit and Mackinac Railway Company							62			19													
Detroit and Toledo Shore Line Railroad Company, The							66			20													

[1] Will only apply at points on Canadian Pacific Ry. in the States of Maine and Vermont.

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																						
	W. S. Curtlett, Agent						B. T. Jones, Agent						R. G. Raasch, Agent			I. N. Doe, Agent							
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. FI No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. FI No.	Pa.-P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C.-N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Detroit and Western Railroad Co.							8			1													
Detroit Terminal Railroad Company	X7, No. 1																						
Detroit, Toledo and Ironton Railroad Company							38			14													
Donora Southern Railroad Company							3					3											
East Broad Top Railroad and Coal Company	29					24																	
East Jersey Railroad and Terminal Company	111																						
East Washington Railway Company	15			7																			
Elgin, Joliet and Eastern Railway Company													119	29	27								
Erie Railroad Company (Lines Buffalo, Salamanca, N. Y., and East)	122				78	60																	
Erie Railroad Company (Line Buffalo, Salamanca, N. Y., and West)							2				2												
Etna & Montrose Railroad Company							11					8											
Fairport, Painesville and Eastern Railroad Company, The							33																
Federal Valley Railroad Company, The							27																

| | | |

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						B. T. Jones, Agent						R. G. Rausch, Agent			I. N. Doe, Agent								
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. FI No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. FI No.	Pa.-P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C.-N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Jamestown, Westfield and Northwestern Railroad Company							22																	
Johnstown and Stony Creek Rail Road Company							5					5												
Lackawanna and Wyoming Valley Railroad Company	86					26																		
Lake Erie and Eastern Railroad Company, The	(FX2 No. 3)																							
Lake Erie and Fort Wayne Railroad Co.							6		4															
Lake Erie, Franklin & Clarion Railroad Company	64					23																		
Lakeside and Marblehead Railroad Company, The							51																	
Lake Terminal Railroad Co., The							7																	
La Salle and Bureau County Railroad Company, The							48	10				5												
Lehigh and Hudson River Railway Company, The	74					42																		
Lehigh and New England Railroad Company	89					41	34																	
Lehigh Valley Railroad Company	76					42	37																	
Ligonier Valley Railroad Company	30						13																	
Long Island Rail Road Company, The	88					38																		

Lorain & West Virginia Railway Company, The								50																			
Louisville & Jeffersonville Bridge and Railroad Company								11		1																	
Maine Central Railroad Company																			C27	14		9					
Manistee and Northeastern Railway Company								16			8																
Manistique and Lake Superior Railroad Company								45			19																
102 Manufacturers' Junction Railway Company																28	17										
Marcellus and Otisco Company, Inc., The	13				8																						
Maryland and Pennsylvania Railroad Company	77			27		34																					
Massena Terminal Railroad Company, The	{FX7, No. 1	}																									
McKeesport Connecting Railroad Co								7						9													
Middle Creek Railroad Company	{FX7, No. 1	}																									
Middletown and Unionville Railroad Company (Louis F. Zieres, Trustee)	101				43																						
Mississippi Central Railroad Company	89																										
Monongahela Connecting Railroad Company, The	{FX9, No. 1	}				6																					
Monongahela Railway Company, The	63					37																					
Morristown & Erie Railroad Company	70																										
Moshassuck Valley Railroad Company																			75						13		
Mount Hope Mineral Railroad Company	29																										
Muskegon Railway and Navigation Company	{FX7, No. 1	}																									
Narragansett Pier Railroad Company, The																			60						16		
Newburgh and South Shore Railway Company, The								19																			
New Haven & Dunbar Railroad Company	{FX7, No. 1	}			2																						
New Jersey and New York Railroad Company, The (Peter Duryee, Trustee)	N44				N38																						

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																				
	W. S. Curtiett, Agent						B. T. Jones, Agent						R. G. Roasch, Agent			I. N. Doe, Agent					
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. F1 No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. F1 No.	Pa.-P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	Mich. FM-1 No.	P. S. C.-N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. F1 No.	P. S. C.-N. Y. F1 No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
New Jersey, Indiana & Illinois Railroad Company							63		22													
New York and Long Branch Railroad Company, The	84																					
New York Central Railroad Company, The							4	3	3	2	3	3						3				
Boston and Albany District.																						
Chicago, Kalamazoo & Saginaw District.																						
Cleveland, Cincinnati, Chicago & St. Louis District.																						
Eastern District.																						
Michigan Central District.																						
Western District.																						
West Shore District.																						
New York, Chicago and St. Louis Railroad Company, The							A25	A13	A13		A16	A13										
New York, New Haven and Hartford Railroad Company, The (Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees)																96		24		45	22	
183 New York, Ontario and Western Railway Company (Raymond L. Gibbardt and Ferdinand J. Siegbardt, Trustees)	81				48	40																
New York, Susquehanna and																						

| | | |

LIST OF CARRIERS—Continued

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						B. T. Jones, Agent						R. G. Rasach, Agent			I. N. Doe, Agent								
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. F1 No.	P. S. C. Md. F Md. 1 No.	P. S. C. N. Y. F1 No.	Pa.-P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	Mich. FM-1 No.	P. S. C. N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. F1 No.	P. S. C. N. Y. F1 No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Pullman Railroad Company	FX1 No. 6																							
Rahway Valley Company (Rahway Valley Company, Lessee)	89																							
Raritan River Rail Road Company	26																							
Reading Company	43					26																		
104 River Terminal Railway Company, The	14																							
Roslyn Connecting Railroad Company	18																							
Rutland Railroad Company (William E. Navin and Wallace M. Fay, Trustees)																A1				A2		A2		
St. Johnsbury & Lake Champlain Railroad Company, The (John E. Willis, Trustee)																1						1		
St. Louis & Belleville Electric Railway Company													26	14										
St. Louis and Ohio River Railroad	69																							
South Buffalo Railway Company	FX2, No. 2				17																			
Springfield Suburban Railroad Company, The	FX7, No. 1																							
Springfield Terminal Railway Company																10						8		

Staten Island Rapid Transit Railway Company, The	61				33																				
Steelton & Highspire Railroad Company	FX8, No. 1					20																			
Suncook Valley Railroad																		18			7				
Toledo, Angola & Western Railway, The	FX7, No. 3																								
Toledo, Peoria & Western Railroad (Holly Stover, Federal Manager)							62	28																	
Toledo Terminal Railroad Company, The							40																		
Toronto, Hamilton and Buffalo Railway Company, The							FX8, No. 40																		
Trenton-Princeton Traction Company	23																								
Union Freight Railroad Company (Boston, Mass.)																		30		9					
Union Railroad Company							40					9													
Unity Railways Company	24																								
Upper Merion and Plymouth Railroad Company	FX7, No. 1					1																			
Wabash Railroad Company [1]							268	62	47	20	30														
Washington and Old Dominion Railroad	92																								
Waynesburg & Washington Railroad							22					13													
Western Maryland Railway Company	90			28		29																			
Wharton and Northern Railroad Company	45																								
Wheeling and Lake Erie Railway Company, The							49																		
Winfield Railroad Company, The							26				17														
Wyandotte Southern Railroad Company							6																		
Wyandotte Terminal Railroad Company							A7			A															
Yazoo and Mississippi Valley Railroad Company	161																								
York Utilities Company																		15		6					
Youngstown & Northern Railroad Company, The							7																		

[1] Will only apply at points on Wabash R. R. in the States of Illinois, Indiana, Michigan, New York, and Ohio.

106 Rule I.—Except as otherwise provided in Rule III and except as otherwise provided in other tariffs, cars of freight moving at carload rates including switching rates and cars of less carload or any quantity freight subject to rules governing the handling of ferry or trap cars as published in tariffs lawfully on file with the Interstate Commerce Commission and State Commissions, will be delivered on and removed from privately owned sidetracks or industrial tracks near and connecting with the carrier's tracks without any additional charge, provided there are no conditions which make it unsafe for the carrier's locomotives to operate over such tracks, or that prevent the carrier from receiving or delivering cars at its ordinary operating conveneince. (See Note 2.)

Rule II.—Except as otherwise provided in Rule III, cars covered by Rule I will be received and delivered at loading and unloading locations on tracks designated by the industry within the industrial plant site without any additional charge when that service can be ordinarily performed in continuous movement at the carrier's ordinary operating convenience, within the meaning of these terms as defined in Notes 1 and 2, provided the locomotives in general use for switching in the vicinity of the plant site can safely operate over the tracks within the plant site.

Rule III.—When receipt or delivery of a car or cars as provided in Rules I and II cannot be accomplished in continuous movement at the carrier's ordinary operating convenience because of interruption, interference or any other condition caused by the shipper or consignee, the carrier will arrange for receipt or delivery under the following provisions:

(a) If it appears that the delay will be of a temporary nature the locomotive will be held at the nearest available location and the service completed when conditions permit. For delay to the locomotive when so held a charge of $1.00 for each five minutes or fraction thereof in excess of 30 minutes will be assessed, which charge will be in addition to the published rate or rates.

Charges will be assessed in accordance with the next preceding paragraph when delays encountered during a locomotive trick or shift aggregate more than 30 minutes.

(b) If, after a reasonable period of delay, the obstruction or condition preventing completion of service has not been removed or eliminated the carrier may, at its option, withdraw its locomotive and place the car or cars on a hold or other available track or tracks within, or without, the industry plant site. Charges for the delay encountered shall be computed in accordance with paragraph (a). Subsequent movement by carrier locomotive of the car or cars from the hold or other track or tracks to actual point of delivery will be subject to a charge of $3.47 per car.

(c) For the purpose of applying the provisions of paragraphs (a) and (b) time shall commence to run from the minute the conductor determines that the shipper or consignee is unable to accept service.

Definition of Terms Used Herein

Note 1.—"Continuous movement" means a movement between the carrier's tracks and the loading or unloading locations, a hold track or tracks, or other place where cars are received or delivered without any delay or any suspension or break in time, or continuity of the movement, due to any circumstances or condition for which the industry is directly responsible.

Note 2.—"Ordinary operating convenience" means the time selected by the carrier when it is most advantageous to the carrier, in relation to its coordinated and harmonious switching activities in a particular switching zone, when the terminal services are performed by switching locomotives, or at the time the train arrives at the plant site when the terminal services are performed by road-haul locomotives. Ordinarily it contemplates only one switch a day except when additional switches are made by the carrier in its own or the public interest, as distinguished from the industry's interest, to secure the prompt release of equipment or facilities, or when necessitated by the volume of traffic. Movements to, from or within the plant site at other times at the request of the industry or to meet the requirements of industrial operations are not at the carrier's ordinary operating convenience.

107 STATE OF ILLINOIS,
County of Cook, ss:

CERTIFICATE OF SERVICE

I, John P. Staley, Attorney for the intervener, Swift & Company in the above entitled action, hereby depose and say that on the 24th day of December 1946, I served the attached answer upon each other party to this action by depositing a copy in the United States mails, postage prepaid, addressed to each of the following attorneys and representatives at his respective address as follows: Mr. Dwight D. Buss, 1956 Union Commerce Bldg., Cleveland, Ohio; Mr. George H. P. Lacey, 1857 Union Commerce Bldg., Cleveland, Ohio; Mr. Willis T. Pierson, Law Department, Erie Railroad Company, Midland Building, Cleveland, Ohio; Mr. John A. Duncan, 1669 Union Commerce Bldg., Cleveland, Ohio; Mr. Robert R. Pierce, 1324 W. Third Street, Cleveland, Ohio; Honorable Don C. Miller, United States District Attorney for the Northern District of Ohio, Federal Building, Cleveland, Ohio; Honorable E. M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.; Honorable Thomas C. Clark, Attorney General of the United States, Washington, D. C.

Witness my signature this 24th day of December, 1946.

John P. Staley.
JOHN P. STALEY.

Subscribed and sworn to before me, the undersigned Notary Public in and for Cook County, State of Illinois this 24th day of December 1946.

JEAN J. SMITH,
Notary Public.

My commission expires May 15, 1948.

109 In United States District Court

[Title omitted.]

No. 24435 Civil

Order assembling a three-judge court

Filed Jan. 2, 1947

It appearing that the plaintiffs filed a bill of complaint on November 20, 1946, in the above-entitled proceedings, seeking to set aside and annul an order of the Interstate Commerce Commission, and this court having found that the issues joined must be pre-

sented to a statutory court consisting of three judges, one of whom shall be a circuit judge,

It is, therefore, ordered that the issues in this case be, and they are hereby, set for hearing on Tuesday, February 25, 1947, at 10 o'clock, A. M., in the Federal Court Building in the City of Cleveland, Ohio, and the Honorable Florence E. Allen, United States Circuit Judge, Sixth Circuit, and the Honorable Emerich B. Freed, United States District Judge for the Northern District of Ohio, or such other judge or judges as circumstances may require to be substituted for either or both of these judges, are called to the assistance of the judge of this court to hear and determine the said cause.

PAUL JONES,
United States District Judge.

JANUARY 2, 1947.

110 In District Court of the United States, Northern District of Ohio, Eastern Division

Civil No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Motion for preliminary injunction

Filed, Dec. 13, 1946

The plaintiff herein moves this Honorable Court for preliminary injunction, restraining and enjoining the defendants, their employees, attorneys, agents, and all other persons in participation with them, pending the final hearing and determination of this action, from putting into effect and enforcing the order of the Interstate Commerce Commission in Docket No. 28714 entitled Swift & Company v. Baltimore and Ohio Railroad Company, et al., on the grounds that:

(1) Unless restrained by this Court the defendants will enforce the said order and perform the acts referred to;

(2) Such action will result in irreparable injury, loss and damage to the plaintiff and its property, as more particularly appears in the verified complaint and the affidavit of Matthew S. Farmer, attached hereto;

(3) The issuance of a preliminary injunction herein will cause

no undue inconvenience or loss to the defendants but it will, on the other hand, prevent irreparable injury to the plaintiff and its property.

THE CLEVELAND UNION STOCK
YARDS COMPANY,
By M. S. FARMER
Its Attorney,
802 Engineers Building, Cleveland 14, Ohio.

111 *Affidavit in support of motion for preliminary injunction*

STATE OF OHIO,
Cuyahoga County, ss:

Matthew S. Farmer, being first duly sworn, upon oath, deposes and says that:

He is the Attorney for The Cleveland Union Stock Yards Company, the plaintiff herein, and as such has personal knowledge of the fact that the plaintiff was respondent in a cause of action before the Interstate Commerce Commission entitled Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., under Docket No. 28714, and that he has personal knowledge of all the facts hereinafter stated.

Affiant further says that The Cleveland Union Stock Yards Company operates a stock yards and public market on the westerly side of West 65th Street in Cleveland, Ohio, and in connection therewith it has a sidetrack of 1,619 feet located on its property near the westerly side of West 65th Street; that Swift and Company and other packers operate livestock processing plants in the stockyard district; that the sidetrack of Swift and Company does not connect directly with the New York Central main line of railroad; that any connection must be by the use of said sidetrack of The Cleveland Union Stock Yards Company; that the use of said track for delivery of livestock to Swift and Company will divert the business from the Stock Yards without compensation; that the plaintiff is entitled to compensation commensurate with the revenue it would charge if deliveries were made through the Stock Yards; that it has been unable to reach an agreement for compensation with either The New York Central Railroad Company or Swift and Company; that the order of the Com-
112 mission appropriated the property of the plaintiff without just compensation for use of Swift and Company; that the plaintiff is deprived of due process of law under Constitutional guarantees; that the plaintiff would be subject to severe penalties under the Interstate Commerce Act if it arbitrarily refuses the use of its sidetrack for deliveries of its livestock to the plant of

Swift and Company; and that by reason of all these things The Cleveland Union Stock Yards Company would suffer irreparable injury and damage to its business and property and it has no plain, complete and adequate remedy at law.

Further affiant sayeth naught.

M. S. FARMER.

Sworn to before me and subscribed in my presence this 13th day of December A. D. 1946.

[SEAL] ELMER J. WARRICK,
Notary Public,
Cuyahoga County, Ohio.

My commission expires Sept. 4, 1947.

114 In United States District Court

Civil No. 24479

[Title Omitted.]

Complaint

Filed Dec. 13, 1946

To the Honorable the Judges of the District Court of the United States, for the Northern District of Ohio, Eastern Division:

The Cleveland Union Stock Yards Company is a corporation and as plaintiff in this action complains of the defendants, The United States of America and The Interstate Commerce Commission, and alleges that it has a cause of action against them cognizable by this Court because of the facts set forth in the following paragraphs:

I

The plaintiff is now and was at all times mentioned herein a corporation duly organized and existing under the laws of the State of Ohio for the purpose of carrying on a stock yard business and the plaintiff is a citizen of the State of Ohio and a resident of the City of Cleveland in the Northern District of Ohio, Eastern Division.

II

The plaintiff was a party to, and is interested in, certain proceedings brought and instituted before one of the defendants, The Interstate Commerce Commission, by Swift & Company, a corporation, details of which are hereinafter more particularly set forth. Said proceedings were styled No. 28714, Swift &
115 Company vs. The Baltimore and Ohio Railroad Company, et al. The grounds upon which the jurisdiction of this

Court depends are that this is a suit to enjoin the enforcement of, and to set aside, suspend and annul, an order made and entered in said proceedings by The Interstate Commerce Commission as reported in 266 I. C. C., page 55. By reason thereof this suit is of a civil nature in equity which arises under the Constitution and laws of the United States. It is brought under and by authority of the Act of Congress approved October 22, 1913, and known as The District Court Jurisdiction Act, U. S. C. Title 28, Section 41 (27) to 48. The said order was to become effective August 30, 1946, but by requested action of the Commission on several occasions the effective date has finally been postponed until February 28, 1947. A copy of the report and order of the Commission is attached hereto as "Exhibit A."

III

The United States of America is made a party defendant under authority of The Jurisdiction Act, U. S. C. Title 28, Section 46.

IV

The Interstate Commerce Commission was created as an administrative body by the Act to Regulate Commerce, approved February 4, 1887, and exists under and by virtue of said Act and various other acts amending and supplementing the same, all of which are known as The Interstate Commerce Act, Title 49 U. S. C. The powers and duties of said Commission are defined and vested by said Act.

V

The plaintiff, The Cleveland Union Stock Yards Company, was incorporated under the laws of the State of Ohio in 1893 for the purpose of operating a general stockyards business. Ever since its organization it has been, and is now, engaged in the business of operating public stockyards and a public market on West 65th Street, Cleveland, Ohio. In connection with its stockyard business it has loading and unloading chutes, pens,
116 alleys, driveways, other stockyard facilities, and railroad switches and tracks. One particular track, which is involved here because of the report and order of The Interstate Commerce Commission, is owned by the plaintiff and is located upon the property of the plaintiff slightly west of West 65th Street, Cleveland, Ohio, and in close proximity to said Street. It is 1,619 feet long and lies between the main line of The New York Central Railroad Company and the plant of Swift & Company. The compelled use of that track for delivery of livestock

to Swift & Company's plant in the Stock Yards District in said City of Cleveland, contrary to contractual relationships and legal rights of the plaintiff as hereinafter more particularly set forth, was involved in the proceedings before The Interstate Commerce Commission, and whether such use can be compelled by the Commission is therefore involved in this suit.

VI

After Congress passed the Packers and Stock Yards Act in 1921, U. S. C. Title 7, Sections 181 to 231, the yards of the plaintiff on West 65th Street, Cleveland, Ohio, were posted as a "Stockyard" under the provisions of said Act, and from then until now the plaintiff has been under the jurisdiction of the United States Secretary of Agriculture as to stockyard service. With respect to nonstockyard service, the plaintiff is free to make its own contracts and agreements as a private industry.

VII

Swift & Company is a corporation organized under the laws of the State of Illinois, having its principal place of business and general offices in the City of Chicago in said State. It is engaged in the packing house business and in connection therewith it operates a branch packing plant for the processing of livestock in the Cleveland Stock Yards District between West 63d and West 65th Streets. It can receive freight in railroad cars at
117 its Cleveland plant only by use of the plaintiff's private sidetrack of 1,619 feet for the purpose of switching cars from the main line of The New York Central Railroad to said plant. For many years, by virtue of conventional sidetrack agreements, cancelable at the will of either party upon certain notice, definite as to manner and time (six months under the existing agreement), the plaintiff has permitted The New York Central Railroad Company to use said sidetrack for transportation of freight in railroad cars, exclusive of livestock, to and from the plant of Swift & Company and other plants accessible to said sidetrack. The plaintiff has, however, in its sidetrack agreement with The New York Central Railroad Company, found it necessary, for the protection of its own business, to prohibit the delivery of livestock from its said sidetrack to Swift & Company and other plants accessible to said sidetrack unless the plaintiff receive compensation which would be commensurate with the loss of business suffered in the diversion of livestock from the plaintiff's stockyards for direct delivery to the plants of Swift & Company and other packers located on said sidetrack. The New York Cen-

tral Railroad Company and the plaintiff could never agree upon what compensation the plaintiff should receive for the use of said sidetrack for the delivery of livestock and therefore, under the terms of the sidetrack agreement between said Railroad and the plaintiff, no livestock can be delivered to the plants of Swift & Company and the other packers on said sidetrack, but with the consent of the plaintiff it is used for the movement of other freight in railroad cars to and from said plants.

VIII

On or about September 3, 1941, Swift & Company filed with The Interstate Commerce Commission a complaint against The Baltimore and Ohio Railroad Company and all other railroad companies serving Cleveland, Ohio. The said Complainant also named The Cleveland Union Stock Yards Company as a de-
118 fendant upon the theory that it was a proper party and subject to the orders of The Interstate Commerce Commission under and by virtue of The Interstate Commerce Act, U. S. C. Title 49, Section 42. The complaint alleged a number of violations of The Interstate Commerce Act by the railroad companies named as defendants therein and sought the establishment of tariff provisions and other relief which would result in transportation to its plants of carload shipments of livestock at rates not in excess of the line-haul rates of the railroads named defendants in said proceedings.

The Cleveland Union Stock Yards Company, plaintiff herein, was alleged to be partly responsible for the alleged violation of The Interstate Commerce Act in that it refused to permit the delivery of livestock by said railroad companies over the 1,619 feet of track owned by the plaintiff, thereby depriving Swift & Company, the Complainant in said proceedings before The Interstate Commerce Commission, of delivery of carload shipments of livestock at its plant in Cleveland, Ohio.

IX

The defendant, The Interstate Commerce Commission, in making the findings and report, and in issuing the order in the case of Swift & Company vs. The Baltimore and Ohio Railroad Company, et al., No. 28714, 266 I. C. C. 55, exceeded the power and authority delegated to it by The Interstate Commerce Act and by the Constitution of the United States and erred as a matter of law in the following particulars:

(a) In asserting jurisdiction over this plaintiff and over the subject matter of the Complaint. The Complaint of Swift & Com-

pany should have been dismissed by The Commission, particularly as to this plaintiff. The Cleveland Union Stock Yards Company is not, and was not then, a common carrier. Section 42 of The Interstate Commerce Act does not vest in The Interstate Commerce Commission the power to take the property of The Cleve-
119 land Union Stock Yards Company, even for public use, contrary to Amendments V and XIV to the Constitution of the United States. Congress did not intend Section 42 to empower The Interstate Commerce Commission to assume judicial functions such as are involved in condemnation proceedings. If Congress had intended to so empower the Commission, then Section 42 would have been null and void in that respect because of Constitutional prohibitions. These matters are left to the Courts and only to the Courts.

To compel this plaintiff permanently to permit the use of its sidetrack and the land occupied thereby for delivery of livestock to Swift & Company would amount to taking a strip of land fronting on West 65th Street, Cleveland, Ohio, without just compensation and without due process of law, guaranteed by the Constitution of the United States. The compelled use of this plaintiff's track and property would, moreover, deprive the plaintiff of revenue. The plaintiff is a Stock Yards Company engaged in the business of handling, storing, and delivering livestock, including livestock consigned direct to Swift & Company and other packers, in connection with which it has provided and maintains pens, alleys, railroad sidetracks, and other necessary facilities, and for the use of which it derives revenue based upon rates approved by the Secretary of Agriculture or upon agreements covering non-stockyard services. As a public stockyard it must provide facilities to accommodate all reasonable peaks of volume of livestock received from the Railroad Company for delivery to packers through its stockyards. The charges for the use of these facilities average $3.73 per car. If livestock should be diverted from the pens of the plaintiff for delivery by the use of its sidetrack, plaintiff would then be deprived of compensation for the facilities, which would as a consequence remain idle. The plaintiff could not long remain in business under such circumstances.

120 (b) In holding that the sidetrack of the plaintiff had been "devoted to public use" and that such public use constituted any controlling factor. There was no evidence or law to substantiate a finding that the sidetrack had been dedicated to public use. The Commission therefore fully recognized that the use of said sidetrack was under a cancelable contract and that therefore it could not find that it had been dedicated to public use in such manner as to create an easement or prescriptive right.

Under the circumstances the plaintiff has the legal right not only to cancel the said contract but to entirely withdraw the use of said sidetrack for deliveries of any kind to the plants of Swift & Company and other packers.

(c) In holding that the plaintiff's 1,619 feet of track were a part of the general railroad system of The New York Central Railroad Company under the definition of a railroad under Section 1 (3) (a) of The Interstate Commerce Act.

The said sidetrack was not a part of said railroad system because: (1) it is the private industrial sidetrack of the plaintiff entirely located within its stockyards and upon its land; (2) The New York Central Railroad Company uses the track by virtue of the sidetrack agreement which restricts such use in time and manner, a right inherent in The Cleveland Union Stock Yards Company as the owner thereof; (3) Section 1 (22) of The Interstate Commerce Act specifically describes the character of track 1,619 and removes it from the jurisdiction of The Commission.

(d) In holding a violation of Section 3 (1) because of deliveries to The Lake Erie Provision Company, The Long Dressed Beef Company and The Ohio Provision Company. The circumstances and conditions surrounding the transportation of livestock to the plant of Swift & Company are not substantially similar to those surrounding the transportation of livestock to the three above-named companies for the reason that said three
121 companies are located on the main line of The New York Central Railroad Company and they are not within the stockyards district and do not require the use of the private industrial sidetrack of the plaintiff, whereas deliveries to the plant of Swift & Company must be by the use of this sidetrack. As a matter of fact, all packers who, like Swift & Company, are located on the 1,619 feet of sidetrack, are denied the use of said sidetrack for deliveries of livestock. Those packers are in fact and in law similarly situated. There is no violation and all such packers are treated exactly alike with respect to the use of the plaintiff's sidetrack.

(e) In holding that the compensation sought by the plaintiff for the use of its sidetrack for deliveries of livestock to Swift & Company amounted to a penalty. The Cleveland Union Stock Yards Company operated a stockyard under jurisdiction of the Secretary of Agriculture and by virtue of the Packers and Stock Yards Act its revenue depended upon handling livestock through its yards. The use of its sidetrack for deliveries of livestock to the plants of the packers would interfere with the plaintiff's own business. It had the right to protect itself and its business and the property of its stockholders by imposing charges upon The

New York Central Railroad Company for the use of such track. Those charges should compensate the plaintiff for the loss of business diverted by the use of its own instrumentality, that is, its sidetrack.

(f) In holding that Section 1 (9) of The Interstate Commerce Act is applicable. That section deals with switch connections of private sidetracks with the main lines of railroads. Swift & Company's private sidetrack, by virtue of a switch, could not be connected with the main line of The New York Central Railroad or the railroad of any other carrier serving Cleveland except by the use of the 1,619 feet of sidetrack owned by the plaintiff. The plaintiff was not a common carrier. The track has never been condemned or appropriated to a public use. The Commission carefully avoided finding that there had been a dedication
122 to public use. The Stock Yards Company was within its legal right in restricting the use of the track in such manner as to prevent Swift & Company from interfering with its business. There is no jurisdiction in the Commission to compel the plaintiff to permit the use of its track for delivery of livestock. The unconstitutionality of such compulsion is obvious. For these reasons alone, the complaint of Swift & Company should have been dismissed.

(g) In holding that the refusal to deliver livestock to the plant of Swift & Company violated Section 1 (6) of The Interstate Commerce Act. The compelled delivery of livestock over the sidetrack of the plaintiff would amount to taking the plaintiff's property without due process of law. Use of the track over the objection of the plaintiff could be obtained only by proper condemnation proceedings. The Commission has no power in respect to such proceedings. They are for Courts where the property owners may have the right of a trial by jury. In this particular instance, condemnation proceedings would rest with the Courts of Ohio.

(h) In entering an order against this plaintiff, which was indefinite, uncertain, erroneous, and unconstitutional. The plaintiff does not operate a railroad. It is not a common carrier. It has no freight car, passenger car, engine, crew, or anything else, except tracks constructed and maintained for its own use. It has, however, been willing to permit the use of its sidetrack for transportation of freight to the plants of the packers except that it would not permit delivery of livestock. Even that use is available upon proper consideration. In the absence of an agreement as to proper consideration, the restriction was necessary to protect the plaintiff's business. It was lawful. Despite these facts, the order of the Commission is directed to all defendants. This plain-

tiff, in view of the fact that it is not a common carrier and does not operate a railroad, could not comply with the order of the Commission. It could not put into force and maintain in
123 force thereafter a schedule, or schedules, providing for delivery of livestock to the sidetrack of Swift & Company.

Because of the unlawful, arbitrary, illogical, indefinite, and uncertain report and order of The Interstate Commerce Commission, as detailed in this Complaint, The Cleveland Union Stock Yards Company will suffer irreparable injury to its business by loss of revenue upon deliveries of livestock to the plant of Swift & Company instead of through its stockyards; by the illegal appropriation of its valuable property without condemnation proceedings; by perpetual use of its land on West 65th Street for easement purposes thereby depriving it of the opportunity of selling the same, or a part thereof, for business purposes; by depriving it of its Constitutional rights of adequate compensation upon condemnation proceedings in Courts, particularly the Courts of Ohio which would have jurisdiction over proceedings to appropriate its property to public use.

Unless the plaintiff can obtain the relief prayed for, including the granting of a restraining order or temporary injunction, it will suffer irreparable injury and damages to its property and business as hereinbefore set forth.

Wherefore, your plaintiff prays (a) that a three-Judge Court be organized, convened, or assembled, one of whom should be a Circuit Judge, to hear and determine the issues herein; (b) that a temporary order or injunction be entered herein, suspending, holding in abeyance, or enjoining the operation, execution, enforcement or effect of the report and order of The Interstate Commerce Commission until further order of this Court; (c) that at final hearing it be held, ordered, adjudged and decreed, that The Interstate Commerce Commission had no jurisdiction over The Cleveland Union Stock Yards Company or its property; that the Commission's report and order exceeded any authority of any kind vested in it; that such report and order was illegal, void,
124 and unconstitutional; that it be set aside, overruled, vacated, cancelled, suspended, and held for naught; that the enforcement thereof be perpetually restrained and enjoined; that the plaintiff be declared to have the legal right to restrict the use of its industrial sidetrack for the protection of its business; that it had the right to collect such compensation as it thought proper; that it has the lawful right to cancel the sidetrack agreement with The New York Central Railroad Company; that it had the legal right to withdraw entirely the use of its sidetrack from Swift & Company and other plants and packers located upon it; and for

such other and further relief as equity and good conscience may require.

THE CLEVELAND UNION
STOCK YARDS COMPANY,
By M. S. FARMER, *Its Attorney,*
802 Engineers Building,
Cleveland 14, Ohio, Main 3567.

[*Duly sworn to by Philip H. Coad; jurat omitted in printing.*]

127 In United States District Court

No. 24479

[Title omitted.]

Order of Consolidation

Feb. 25, 1947

Entered by Allen, Jones, and Freed, Js.:

This day came the parties by their attorneys and upon application of the United States Attorney the court ordered this case consolidated with Civil Case No. 24435 for trial only.

Thereupon the court heard the argument of the attorneys and took the cause under advisement.

128 In United States District Court

Civil No. 24479

[Title omitted.]

Answer of the United States

Filed Jan. 20, 1947

Now comes the United States of America, defendant in the above-entitled civil action, and for answer to the Bill of Complaint filed herein by plaintiffs on December 13, 1946, joins in and adopts the Answer heretofore filed by the Interstate Commerce Commission.

EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.
WENDELL BERGE,
Assistant Attorney General.
DON C. MILLER,
United States Attorney.
FRANCIS B. KAVANAGH,
Asst. U. S. Attorney.

129 CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the attached answer was served on January 17, 1947, upon each of the other parties to this action by depositing a copy in the United States mails, postage prepaid, addressed to each of the following attorneys and representatives at his respective address as follows: M. S. Farmer, Esquire, 802 Engineers Building, Cleveland 14, Ohio; Robert R. Pierce, Esquire, Chief Assistant General Attorney, New York Central Railroad Company, 1324 West Third Street, Cleveland 13, Ohio; John H. Duncan, Esquire, Attorney, Wheeling & Lake Erie Ry. Co., 1669 Union Commerce Building, Cleveland 14, Ohio; Willis T. Pierson, Esquire, General Counsel, Erie Railroad Co., Midland Building, Cleveland, Ohio; George H. P. Lacey, Esquire, % Squire, Sanders & Dempsey, 1857 Union Commerce Building, Cleveland 14, Ohio; Dwight B. Bpss, Esquire, % Baker, Hosteller & Patterson, 1956 Union Commerce Building, Cleveland 14, Ohio; Ross D. Rynder, Esquire, Attorney, Swift & Company, 4115 Packers Avenue, Chicago 9, Illinois; Edward M. Reidy, Esquire, Assistant Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.

EDWARD J. HICKEY, Jr.,
Special Assistant to the Attorney General.

JANUARY 17, 1947.

130 In United States District Court

Civil No. 24479

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Jan. 17, 1947

The Interstate Commerce Commission hereinafter called the Commission, a defendant in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs I, II, III, and IV of the complaint, the Commission admits the same.

II

Answering the allegations of paragraph V of the complaint, the Commission admits that such allegations are substantially correct, except that the Commission denies that the compelled
131 use of the 1,619 feet of track referred to therein is contrary to the legal rights of the plaintiff.

The Commission further alleges that while the said 1,619 feet of track referred to in paragraph V is owned by the plaintiff, such track is maintained and operated by the New York Central Railroad Company in the performance of its necessary common carrier duties and obligations.

III.

Answering the allegations of paragraph VI of the complaint, the Commission admits that plaintiff is subject in some particulars to the provisions of the Packers and Stock Yards Act of 1921. As to the other allegations of this paragraph, the Commission is without knowledge or information sufficient to form a belief as to the truth of such other allegations.

IV

Answering the allegations of paragraph VII of the complaint, the Commission admits the truth of the allegations contained in the first two sentences of said paragraph. The Commission denies that Swift & Company can receive freight in railroad cars at Swift's plant in Cleveland only by the use of plaintiff's track for the purpose of switching cars from the main line of the New York Central Railroad to said plant, and avers that no individual or private use is made by Swift & Company of said track but that by agreements, arrangements, and contracts between plaintiff and the New York Central Railroad Company, said 1,619 feet of track has become a part of the terminal facilities of the New York Central Railroad Company, which Swift & Company uses in common with other shippers or receivers of freight. The Commission therefore denies that said 1,619 feet of track is a private side track, as referred to in said paragraph, but avers that,
132 on the contrary, said portion of track is, under the Interstate Commerce Act, a portion of the New York Central's line of railroad.

The Commission is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph VII, but for a more full and correct statement in connection therewith it refers to the report and order of the Commission, attached to the complaint as Exhibit A.

V

Answering the allegations of paragraph VIII of the complaint, the Commission admits the same.

VI

Answering the allegations of paragraph IX of the complaint, the Commission denies that its report and order is invalid or in excess of its statutory authority for the reasons set forth in said paragraph IX, or for any other reason or reasons.

Answering further the allegations of the complaint, the Commission avers and alleges that the portion of track therein referred to as owned by the Cleveland Union Stock Yards Company is a part of the tracks of the New York Central Railroad Company, operated by the latter subject to the provisions of the Interstate Commerce Act; that, under contracts with the said Stock Yards, the New York Central has for years used, and still is using, the track as part of its railroad and terminal facilities at Cleveland; that the agreed, as well as actual, use, has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New
133 York Central's terminal track by which it renders common carrier switching service to and from the plant of Swift & Company and the several other plants and industries served thereby; that, while by amendment to the contracts made in 1935, restrictions, or conditions, were especially imposed as to the carriage of livestock, the use of the Stock Yard's track for all other traffic was continued just as formerly; that the Stock Yards, in contracting with the New York Central, presumably knew that it was dealing with a common carrier subject to regulatory laws; and that, as stated in the Commission's report (p. 65), "To say that the Stock Yards, while granting the use of its track 1619 generally for common carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by special provisions in their contract, change and nullify the laws under which the latter operates."

Further answering the said allegations, the Commission says that, in performing its duties of regulating rates, practices, and service, it is constantly dealing with railroad lines or trackage, both road-haul and terminal, that include trackage held under lease, or trackage agreements, and where the leases, or agreements, may contain a provision for termination upon specified notice, or the termination date may be within the comparatively near future; that it may not, because of such considerations, abdicate

its duties but must enforce the Act's provisions under the existing conditions as to leasehold or trackage rights; that, similarly here, while the agreement between the Stock Yards and New York Central contained a clause authorizing termination by
134 either party upon 60 days' notice, this did not afford excuse for permitting continuance of the violations of the Act shown; nor did it obligate the Commission to attempt to anticipate what the parties might in the future do under the termination clause, or as to just what were their rights in that respect.

Answering further the allegations of paragraph (d) of section IX of the complaint, the Commission denies the same. In this connection the Commission avers that the question of violation of section 3 of the Act is primarily administrative and committed to the Commission's determination; that the Stock Yards, in contracting with the New York Central for the use of the track referred to, was dealing with a common carrier subject to regulatory laws; that whatever the Stock Yard's right to altogether withdraw its track from public use (which question was neither involved nor decided), it could not, while continuing to grant the use thereof generally for public service, single out particular traffic and, under the guise of a contract restriction or condition, force the railroad to refuse to switch and make delivery of such traffic as billed and as was its duty under the Act, or, in the alternative, to pay a special charge set up as in effect penalty for observing its tariffs and other duties under the laws to which it was subject; that that was not a lawful exercise by the Stock Yards of its rights in the track; that the railroad's acquiescence therein did not change this; that, therefore, the Stock Yard's asserted right to impose such special restrictions was not a circumstance which, as matter of law, rendered substantially different the circumstances and conditions in switching and making delivery of livestock to the plant of Swift & Company than were the circumstances and conditions in rendering like service to its competitors; and that, consequently, since no lawful con-
135 dition within the right of the Stock Yards to impose precluded the railroad from rendering such service for Swift & Company, it is obvious that the question of whether its failure to do so was unduly prejudicial was left as a purely administrative question committed to the judgment and determination of the Commission.

Further answering the allegations of the complaint, the Commission admits and alleges that it made and entered the report and order of May 3, 1946 (266 I. C. C. 55) referred to in paragraph II of the complaint and made a part thereof as Exhibit A, in a proceeding then pending before it entitled Docket No. 28714, Swift & Co. v. Baltimore & Ohio Railroad Company et al., following

complaint filed with it on September 5, 1941, by Swift & Company as alleged in paragraph VIII of the complaint; that thereafter answer was filed to said complaint by plaintiff herein; that thereafter the proceedings came on for formal hearing at Cleveland, Ohio, on April 22, 1942, before Examiner Carter, at which hearing much oral testimony and other evidence in the form of exhibits was introduced by the respective parties; that thereafter briefs were filed by the parties with the Commission in support of their respective contentions; that thereafter, on or about April 1, 1943, a proposed report was served by Examiner Carter, recommending dismissal of Swift & Company's complaint, to which exceptions were filed by Swift & Company and a reply to said exceptions filed by the railroad defendants in the proceedings; that thereafter oral argument was had before the Commission on June 4, 1943; that by order of June 14, 1943, the proceeding was reopened for further hearing by the Commission whereupon further hearings were held before Examiner Haden at Cleveland on June 22, 1944, at which much further oral testimony and other evidence in the form of exhibits was introduced; that there-
136 after briefs on the rehearing were filed with the Commission by complainant, Swift & Company, and the railroad defendants; that thereafter, on or about May 26, 1945, a proposed report was served by Examiners Haden and Banks, again recommending dismissal of the complaint of Swift & Company to which exceptions were filed by Swift & Company, and replies to said exceptions were filed by defendants railroads and defendant Cleveland Union Stock Yards Company; that thereafter the case came on for reargument before the Commission on October 3, 1945, following which the Commission made and entered and served upon all parties to said proceedings its said report of May 3, 1946, and its said order of the same date. The Commission further alleges that following the issuance of said report and order of May 3, 1946, petition for reconsideration was filed with the Commission by plaintiff herein, Cleveland Union Stock Yards Company, to which a reply to said petition was filed by Swift & Company, and subsequently petition for reconsideration of said decision of May 3, 1946, was filed with the Commission by the railroad defendants in said Docket No. 28714, to which full reply was made by complainant, Swift & Company, following which the entire Commission, by order of October 7, 1946, denied said petitions for reconsideration filed by railroad defendants and defendant Cleveland Union Stock Yards Company. The Commission further alleges that by subsequent orders said order of May 3, 1946, has been from time to time extended so that its present effective date is February 28, 1947, on five days' notice.

The Commission admits and alleges that in said proceedings

the parties thereto, including the plaintiff herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large
137 volume of testimony and other evidence bearing upon the matters covered in said report and order were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff herein by its counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiff in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the plaintiff herein, its said report and order of May 3, 1946, 266 I. C. C. 55, annexed to and made part of the complaint as Exhibit A; that said report and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which its order of May 3, 1946, was based.

The Commission further alleges that the findings and conclusions of said report were and are, and that each of them was and is fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

138 The Commission further alleges that said report and order of May 3, 1946, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint. The Commission denies that its said orders are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said complaint, or for any other reason or reasons. The Commission denies that its said order causes, or will cause, plaintiff either irreparable damage or any damage if said report and order are not enjoined.

Except as herein expressly admitted, the Commission denies

the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and order referred to and made a part of the complaint as Exhibit A, which report and order are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By E. M. REIDY, *Assistant Chief Counsel.*
GORDON C. LOCKE, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel.

139 [*Duly sworn to by J. Haden Alldredge; jurat omitted in printing.*]

140 CERTIFICATE OF SERVICE.

I, Edward M. Reidy, Attorney for defendant Interstate Commerce Commission in the above-entitled action, hereby certify that on the 16th day of January 1947, I served the attached answer upon each party to this action by depositing a copy in the United States mails addressed to each of the following attorneys and representatives at his respective address as follows: M. S. Farmer, Esq., 802 Engineers Bldg., Cleveland 14, Ohio; Edward J. Hickey, Esq., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.; R. R. Pierce, Esq., Chief Assistant General Attorney, New York Central System, 1324 West Third Street, Cleveland 13, Ohio; Honorable Don Miller, United States District Attorney, Northern District of Ohio, Federal Bldg., Cleveland, Ohio; John H. Duncan, Esq., Attorney, The Wheeling & Lake Erie Ry. Co., 1669 Union Commerce Bldg., Cleveland 14, Ohio; Willis T. Pierson, Esq., General Counsel, Erie Railroad Co., Midland Bldg., Cleveland, Ohio; George H. P. Lacey, Esq., % Squire, Sanders & Dempsey, 1857 Union Commerce Bldg., Cleveland, Ohio; Dwight B. Buss, Esq., % Baker, Hosteller & Patterson, 1956 Union Commerce Bldg., Cleveland, Ohio; Ross D. Rynder, Esq., Attorney, Swift & Company, Union Stock Yards, Chicago, Ill.

EDWARD M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.

140A In United States District Court

Civil No. 24479

[Title omitted.]

Motion of Swift & Company for leave to intervene as a party defendant

Filed Dec. 20, 1946

(S) "Leave granted. Jones. 12/20/46 Judge."

Comes now Swift & Company, a corporation of the state of Illinois, and moves the court for leave to intervene in this action in order to assert defenses to be set forth in an answer to be filed herein and, in support of said motion, said Swift & Company shows the court as follows:

1. Swift & Company was and is the complainant before the Interstate Commerce Commission in a proceeding known on the records of said Commission as docket No. 28714, Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55. On May 3, 1946, said Commission made its report and order in said proceeding in which it granted certain relief sought therein by Swift & Company. Plaintiff has filed this action seeking to set aside said report and order of said Commission.

2. U. S. C. A. title 28, § 45a, authorizes Swift & Company, as a party in interest to said proceeding before said Commission, to intervene herein as of right.

Wherefore, said Swift & Company respectfully prays for the entry of an order granting it leave to intervene herein and to be made a party defendant hereto and to file instanter its separate answer to the complaint heretofore filed herein.

(S) Ross Dean Rynder,
(S) John P. Staley,
Attorneys for Swift & Company,
4115 Packers Avenue, Chicago 9, Illinois.

141 In United States District Court

Civil No. 24479

[Title omitted.]

Answer of Swift & Company, intervener

Filed Dec. 26, 1946

Now comes Swift & Company, hereinafter referred to as the intervener, and, for its separate answer to plaintiff's complaint herein, alleges and says:

I

Intervener admits the allegations contained in section I of the complaint.

II

Intervener admits the allegations contained in section II of the complaint.

III

Intervener admits the allegations contained in section III of the complaint.

IV

Intervener admits the allegations contained in section IV of the complaint.

V

Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in section V of the complaint; but intervener denies that the compelled use of said track for delivery of livestock to Swift & Company's
142 plant in the Stock Yards District in said city of Cleveland is contrary to contractual relationships and legal rights of the plaintiff as set forth in its complaint herein. Intervener avers that, on the contrary, the use of said track by the New York Central Railroad Company was voluntary on the part of plaintiff and said New York Central Railroad Company.

VI

Intervener is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in section VI of the complaint.

VII

Intervener admits that it is a corporation organized under the laws of the state of Illinois, having its principal place of business and general offices in the city of Chicago in said state. Intervener admits that it is engaged in the packing house business and that, in connection therewith, it operates a packing plant for the processing of livestock in the Cleveland Stock Yard District between West 63rd and West 65th Streets. Intervener denies that it can receive freight in railroad cars at its Cleveland plant only by use of plaintiff's private sidetrack for the purpose of switching cars from the main line of the New York Central Railroad to said plant.

Intervener avers that, on the contrary, no use is made by it of said track but that by agreements, arrangements, and contracts between plaintiff and the New York Central Railroad Company said 1619 feet of track has become a part of the terminal facilities of the New York Central Railroad Company. Intervener is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in section VII of the complaint, but for a true and correct statement in connection
143 therewith it refers to the report and order of the Interstate Commerce Commission in No. 28714, Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55, a copy of which is attached to the complaint herein as exhibit "A."

VIII

Intervener admits the allegations of section VIII of the complaint.

IX

Intervener denies that the Interstate Commerce Commission exceeded the power and authority delegated to it by law in issuing the order in No. 28714, Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55. Intervener denies each and every other allegation contained in section IX of the complaint and in paragraphs (a), (b), (c), (d), (e), (f), (g), and (h) thereof. On the contrary, intervener avers that said decision of the Commission, in so far as it consists of findings of fact, is supported by substantial evidence and that the conclusions of law stated by the Commission therein are correct; and that there is no basis in fact or in law upon which said report and order of the Interstate Commerce Commission may be vacated, set aside, annulled, or enjoined by this court.

Wherefore, having fully answered the complaint, intervener prays that the relief therein prayed be denied and that the complaint be dismissed with costs to the intervener and that the intervener have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Ross Dean Rynder,
Ross Dean Rynder,
John P. Staley,
John P. Staley,
Attorneys for Swift & Company,
4115 Packers Avenue, Chicago 9, Illinois.

December 24, 1946.

144 STATE OF ILLINOIS,
County of Cook, ss:

CERTIFICATION OF SERVICE

I, John P. Staley, Attorney for the intervenor, Swift & Company in the above entitled action, hereby depose and say that on the 24th day of December 1946, I served the attached answer upon each other party to this action by depositing a copy in the United States Mails, postage prepaid, addressed to each of the following attorneys and representatives at his respective address as follows: Mr. M. S. Farmer, 802 Engineers Building, Cleveland 14, Ohio; Mr. E. M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.; Mr. R. R. Pierce, Chief Assistant General Attorney, New York Central System, 1324 West Third Street, Cleveland 13, Ohio; Honorable Thomas C. Clark, Attorney General of the U. S., Washington, D. C.; Honorable Don C. Miller, United States District Attorney for the Northern District of Ohio, Federal Building, Cleveland, Ohio.

Witness my signature this 24th day of December 1946.

JOHN P. STALEY.

Subscribed and sworn to before me, the undersigned Notary Public in and for Cook County, State of Illinois, this 24th day of December 1946.

[SEAL]

JEAN J. SMITH,
Notary Public.

My commission expires January 15, 1948.

147 In the District Court of the United States, Northern District of Ohio, Eastern Division.

Civil Action No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil Action No. 24479

THE CLEVELAND UNION STOCKYARD COMPANY, PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Arguments had before Honorable Florence Allen, Honorable Paul Jones, and Honorable Emerich B. Freed, Judges, on Tuesday, February 25, 1947

Appearances

Mr. Dwight B. Buss, For Plaintiff The Baltimore and
148 Ohio Railroad Company; Mr. George H. P. Lacey, and
Mr. Andrew P. Martin, For Plaintiff The Pennsylvania
Railroad Company; Mr. Willis T. Pierson, For Plaintiff The
Erie Railroad Company; Mr. John A. Duncan and Mr. Perry L.
Graham, For Plaintiff The Wheeling and Lake Erie Railroad
Company; Mr. Leo P. Day and Mr. Robert R. Pierce, For Plain-
tiff The New York Central Railroad Company; Mr. Ross Dea
Rynder and Mr. John P. Staley; For Swift & Company, Inter-
vener; Mr. Matthews S. Farmer, For Plaintiff The Cleveland
Union Stock Yards Company; Mr. Edward J. Hickey, Jr., Special
Assistant to the Attorney General, Mr. Wendell Berge, Assistant
Attorney General, Mr. Don C. Miller, United States Attorney,
Mr. Francis B. Kavanagh, Assistant United States Attorney, Mr.
Daniel W. Knowlton, Chief Counsel, For the United States; Mr.
Gordon C. Locke, Attorney, Mr. Edward M. Reidy, Assistant
Chief Counsel, For the Interstate Commerce Commission.

150 Tuesday, February 25, 1947, at 10:00 a. m.

The CLERK. If the Court please, we have for consideration the case of The B. & O. Railroad Company against the United States of America, in Case No. 24435. There was a motion filed just a minute ago to strike from the answer of the Intervener, Swift & Company.

Mr. KAVANAGH. It may be stipulated, if it please the Court, that these cases be consolidated, and the record will be sufficient for either or both.

Judge ALLEN. It is so ordered. Every member of the Court has made some examination of these briefs and of the record. We have all read the order and the consents in the case, and have given examination to the briefs of the various parties.

With that in mind, and considering that after all there is a single question to be presented—it has ramifications, but it is one question—we want to ask Mr. Farmer how long he wants to argue. How much time do you want, Mr. Farmer?

Mr. FARMER. If the Court please, I should like an hour for presentation of the case, and an hour to answer the defendants' briefs.

Judge ALLEN. How much time would be necessary for the gentlemen, who, although they are separate parties, are adversary to the Union Stock Yards Company?

151 Mr. REIDY. I believe an hour and a half ought to be ample for the defendants in this case—not over an hour and a half. We will try and shorten it.

Mr. PIERCE. If the Court please, on behalf of the railroad plaintiffs, we should like some time here to present our part of this. There are two cases.

Judge JONES. Of course, they have been consolidated, and as a matter of fact they both involve the identical issue to be considered.

Mr. PIERCE. That is right.

Judge JONES. While the question may be difficult, the facts are not in dispute, and there is, as I see it—and as Judge Allen suggested—a single issue, although it may have ramifications. For that reason, the Court is not disposed to allow a long period of time, especially when it has been so adequately briefed, and where the Judges have already read not only the briefs, but the decisions of the Commission, and the order.

Judge ALLEN. In the most complex patent cases that exist, an argument of an hour for each side is sufficient, and we have confidence in the ability of you gentlemen to state your cases succinctly.

The Court will allow Mr. Farmer a half hour to open and a half hour to close, if necessary; and we will ask the other gentlemen to state their cases in twenty minutes each. If you
152 need a little extra time, we will consider that, but try to state them in twenty minutes each.

Mr. KAVANAGH. If your Honors please, I would like to present at this time counsel representing the defendants, as well as the Intervener, who will participate in the argument, and has participated in the preparation of a case.

Edward J. Hickey, Jr., Special Assistant to the Attorney General, for the United States; Gordon C. Locke, Attorney; and Edward M. Reidy, Assistant Chief Counsel, for the Interstate Commerce Commission.

For the Intervener, John P. Staley and Ross Dean Rynder, attorneys for the Intervener, Swift & Company.

Mr. HICKEY. Your Honors, may I say at this time that in an effort to conserve the Court's time as much as possible, a joint argument on behalf of the United States and the Interstate Commerce Commission will be made by Mr. Reidy.

Judge ALLEN. That is making progress.

Mr. PIERCE. If the Court please, may I at this time present counsel for the railroad plaintiffs in this case: Mr. Leo P. Day; Mr. Perry L. Graham, with The Wheeling and Lake Erie; Mr. George Lacey for The Pennsylvania Railroad Company; Mr. Andrew Martin, for The Pennsylvania; and Mr. Dwight Buss, for The Baltimore and Ohio Railroad Company.

153 Judge ALLEN. Do counsel wish to introduce the record at this time?

Mr. PIERCE. On behalf of the railroad plaintiffs, I would like

to offer at this time the record of I. C. C. Docket 28714. That includes the transcript of the testimony and the exhibits, and also a copy of the Complaint of Swift & Company, filed in that proceeding, which have been certified by the Commission.

Mr. KAVANAGH. I would like to supplement that record, if your Honors please, by introducing copies of the two oral arguments that were made before the Interstate Commerce Commission in these cases. There were certain admissions or statements made in the oral arguments before the Commission, that we have cited in our brief, and we would like to have some factual background.

Judge FREED. Were those included in your briefs?

Mr. KAVANAGH. Reference to certain statements that were made in the oral arguments is made in our brief, and without this record of the argument before the Commission, there is no way for the Court to check the accuracy of those statements made in the brief.

Judge ALLEN. No objection to them? They may be received.

154 Mr. FARMER. If the Court please, I should like to request that the record which has been certified from the Commission be also applied to the case in which the Cleveland Union Stock Yards Company is plaintiff.

Mr. KAVANAGH. No objection. It isn't necessary to introduce a different record in each case.

Mr. FARMER. Further than that, in view of some admissions that were made by counsel on the other side before the Commission, I should like to introduce the transcript of the minutes of all arguments.

Mr. KAVANAGH. That is already in.

Mr. RYNDER. I should like to have added to that record the petition of the railroad defendants before the Commission—the plaintiffs in this case—seeking reconsideration by the Commission, and the reply of the Intervener, Swift & Company, for the reason that those brought to the attention of the Commission a certain tariff which was attached to our reply and which the railroad defendants are seeking to have stricken from our answer in this Court.

Mr. PIERCE. We should like to object to the introduction of that.

Judge ALLEN. It may be received.

Mr. PIERCE. Exception, please.

Judge ALLEN. Anything else?

155 Mr. KAVANAGH. As a matter of convenience, and not as a part of the record, we have attached to our brief a little map showing the outlay of the plan here, and I have separate copies of the same map. I thought maybe it would be a matter of convenience for the Court to have these outside the brief, and I have some extra copies.

Argument of Mr. Farmer

Mr. FARMER. If the Court please, I shall not take up any time to make a statement of this, because the Court has already indicated that each member has read the brief, and I think the brief very fully states the facts and the issues involved in this case.

I do want to point out on the map here [indicating] the general location of the Cleveland Union Stock Yards Company, plainly identified on this map.

Over here is the main line of the C. C. C. and St. L. Railroad Company, the Big Four, which is leased from the New York Central. The C. C. C. and St. L. is not in this, except through the New York Central. The New York Central being the lessees, that now becomes a part of the main line of the New York Central Railroad.

This [indicating] is West 65th Street, and the New York Central, slightly south of Clark Avenue crosses West 65th Street on the bridge.

This track, outlined in yellow, 1,619 feet, which for convenience is quite often referred to in the briefs and in the pleadings
156 as Track No. 1619, is on the property of the Cleveland Union Stock Yards Company, and the track is owned by the Cleveland Union Stock Yards Company. It is slightly west of West 65th Street, and, as I say, it is on the land of the Cleveland Union Stock Yards Company, which is a very valuable parcel of land bordering along West 65th Street in the stockyards district. We believe the Commission's decision would unconstitutionally take that property for Swift & Company—not actually, for public use, but it would take that property for a private use; that is, the use of Swift & Company, and if any public question is involved in it, it would also take that, or appropriate it without proper judicial proceedings, for the benefit of the public, without just compensation.

The Commission has not fixed any compensation, and I would not have this Court believe that we are under any impression that the Commission could fix any compensation.

It is very definitely the opinion of the plaintiff, the Cleveland Union Stock Yards Company, in this case, that the Commission has no jurisdiction whatever over the stockyards, which is not a common carrier, which operates under the Packers and Stock Yard Act, Title VII, and Section 182 to 202, I think—something like that—and is accounting to the Secretary of Agriculture for its method of carrying on business, so far as the stockyard service is concerned.

But outside of the stockyard service, it has certain
157 private property which it is privileged to deal with as any

private corporation or individual could. It is our contention in this case that we have dealt with it as a private concern, and under private or conventional side track agreements, and there has been no time in the history of this whole controversy, dating from 1899, when that track was built, to the present time, when permissive use has not been granted to the New York Central Railroad by virtue of the conventional side track agreement, and which at all times the stockyards company reserved the right to cancel.

That is important, because the Commission, while it seemed not to dare to hold that there had been a public dedication of this land and the track over the land, to the public, did make a very peculiar statement that it had been devoted to public use for a number of years.

A devotion to public use—a permissive use—which at all times the stockyards controlled and exercised control over—is a far cry from dedication, or proscriptive rights, or a right which arose by reason of adverse possession.

There has been in this brief no authority cited upon that question of a proscriptive or adverse right which has been created here, because the Commission itself had constantly found
158 that the stockyards company reserved and maintained control of that track, and the ownership of it, and everything else, and that it was subject to cancellation at any time the stockyard company desired to cancel it, in accordance with the plain terms and provisions of the contract.

In 1935, the Commission has indicated in its report and findings that there seemed to be no question but that the stockyards and the railroads had not considered that there should be any compensation in reference to the track, because from the very beginning they had not mentioned it.

The Commission overlooked the fact that in 1935, because Swift & Company were at that time receiving some livestock over the track, the President and General Manager of the stockyards company gave the railroad notice of cancellation, as it had a right to do, under its contract.

Then there began the question of negotiations for a new one, and finally one section of the contract was amended so that the track could be used for these various other packers who were located down in here (indicating), and who enjoy receiving carload freight, except delivery of livestock. There are, I think, seven of them down in here who do receive and enjoy delivery of carload freight by the railroad company, with the consent of the stockyard company; so that the negotiations finally led to an amendment of that sidetrack agreement, so that the railroads
159 could use the sidetrack, subject to cancellation always

and subject to that retention of control and ownership by the stockyard company, so that the railroads could continue to use the sidetrack for everything except competitive business.

Now, those words were used in that contract, and much is being said and made of the use of the words "competitive business"; whether or not Swift & Company is competitive with the stockyards; and that has nothing whatever to do with this case, for the reason that the New York Contral and the stockyard company, the contracting parties, understood and construed those words, "competitive business," to mean that they could not haul livestock in carload lots for delivery to Swift & Company. That was the plain understanding of the railroad and of the stockyard company, who were parties to that contract.

From the very inception of this case before the Interstate Commerce Commission, the Cleveland Union Stock Yards Company has taken the position that the Commission had no jurisdiction over it or over its business. It does not own a locomotive or a handcar, or any rolling stock, or anything of that sort.

There are no common carrier phases in it. In fact, I think the other side concedes that it is not a common carrier; so that the contention of the stockyard company in this matter has
160 been, as I say, from the very inception, that the Interstate Commerce Commission had no jurisdiction over the Cleveland Union Stock Yards Company, and over the business it carries on.

I think that we should go to that question of jurisdiction the very first thing. On page 7 of the stockyards' brief, I have quoted Section 1, which states: "The provisions of this Chapter shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for continuous carriage or shipment." And then the terms "common carrier" and "railroad" are defined in Section 1 (3) of the Interstate Commerce Act as follows: "The term 'common-carrier' used in this Chapter shall include all pipe line companies, express companies, sleeping car companies, and all persons, natural or artificial, engaged in such transportation, or transmission, as aforesaid, as a common carrier for hire."

"Wherever the word 'carrier' "—and this is important, because of Section 1, which I just read—"wherever the word 'carrier' is used in this Chapter, it shall be held to mean a common carrier."

"The term 'railroad' as used in this Chapter shall include bridges, car floats, lighters, and ferries, used by or operated
161 in connection with any railroad, and also the road in use by any common carrier, operating a railroad, whether

owned or operated under a contract, agreement, or lease, and all switches, spurs"—and I particular call the attention of the Court to the fact that the word "spur" is used in the definition of railroad, because that is involved in this lawsuit, whether or not that is a spur, and whether or not by reason thereof Section 1 (22) of the Interstate Commerce Act does not exclude it from the jurisdiction of the Interstate Commerce Commission, it being wholly located within the State of Ohio, and not outside the State.

Continuing—"tracks, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property, designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property."

It will be observed that those sections which I have read specify and particularly name certain companies—express companies, pipe line companies—but nowhere do you find a stockyards company named.

The Supreme Court of the United States has delivered a number of opinions in reference to the jurisdiction of the Interstate Commerce Commission.

In the case of The Pennsylvania Railroad vs. The
162 Public Utilities Commission of Ohio, which involved, down in the Youngstown and the Ohio River district, the transportation of coal from mines of the Pennsylvania by privately owned barges and railroads to a certain point in Ohio, where it was screened and washed, and then sent out on transportation, the Supreme Court of the United States held in that case, 266 U. S. 170, L. ed. 1130—on page 171 of United States Reports, and on page 1132 of the latter—as follows:

"Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of coal is to be classified as commerce, or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by Federal commission. The Interstate Commerce Act is aimed at common carriers exclusively."

That is the holding of the Supreme Court. I shall not continue with this case, although I have it in my brief, because it will take too much time.

However, there is the contention of the Cleveland Union Stock Yards Company in this case that under the plain terms of Section 1 (1) and Section 1 (3), the Cleveland Union Stock Yards Company is not subject to a regulation by the Interstate Com-
163 merce Commission, and I might say at this point that dur-

ng the course of this case we shall demonstrate, if it isn't demonstrated by the record, that the Interstate Commerce Commission has plainly and unqualifiedly and arbitrarily regulated the Cleveland Union Stock Yards Company. Relying on Section 12 of Title 49, they have apparently concluded that under and by virtue of that section, notwithstanding the plain definition and the plain law laid down in Section 1, that it has a right to regulate the Cleveland Union Stock Yards Company merely because, by the ownership of that track, it has some interest in the controversy. It, with the other carriers—with the carriers, rather; I don't want that to be taken as an admission against interest—The Cleveland Union Stock Yards Company with the carriers has been ordered to cease and desist from refusing to deliver livestock to Swift & Company. Compliance with the order that was issued by the Commission would be absolutely impossible. I don't know what the Commission expects us to do; whether it expects us to get out and buy rolling stock and equipment, and locomotives, and all of those things that go with the operation of a railroad or not. I don't know what they mean by any such wording of the order as it is there.

In reference to this question of a sidetrack agreement, the Commission has very definitely held—210 I. C. C. 453—that the
164 Commission has no power to enforce the performance of a sidetrack agreement; and the Cleveland Union Stock Yards Company takes the position here that that rule still obtains, and that the Commission is prohibited not only from enforcing a sidetrack agreement, but, by the same token, it cannot order the stockyards what to do in violation of it.

Judge ALLEN. Mr. Farmer, your big question here, or your big difficulty, is the question as to whether the Elkins Act applies to your situation, isn't it?

Mr. FARMER. That is right. I don't think that is the big question, at all, though.

Judge ALLEN. Is it a big question?

Mr. FARMER. They have tried to make it a big question. The Interstate Commerce Act itself has stated that what is subject to regulation is a common carrier by railroad.

Judge ALLEN. But the Elkins Act says that where such actions are instituted before the Interstate Commerce Commission, or in the District Court, it would be lawful to include as parties persons interested or affected by the rate-regulation practice. This is a practice, isn't it?

Mr. FARMER. No; your Honor. I think that that statute, first of all, is very loosely drawn. I think anybody will admit that.

Judge ALLEN. Your company, The Union Stock Yards, is a person interested in the practice under consideration, isn't it?

Mr. FARMER. The only interest The Cleveland Union Stock Yards Company had in this case was to let the railroads have this under a conventional sidetrack agreement.

Judge ALLEN. If you are that interested, if you are that kind of a person, then you have here a statute which specifically provides that orders and decrees may be made with reference to you.

Mr. FARMER. Your Honor, if you carried that out——

Judge ALLEN. That is true, isn't it? If this statute applies to you, if you are a person interested in the practice under consideration, then an order or decree may be made with preference to you, may it not, specifically?

Mr. FARMER. I do not think so.

Judge ALLEN. This statute specifically so provides.

Mr. FARMER. That statute says that; there is no question about that.

Judge ALLEN. And it was enacted subsequent to these other provisions.

Mr. FARMER. I am covering that subject later on.

Judge ALLEN. It was an act enacted subsequent to the other provisions, was it?

Mr. FARMER. I think when it was enacted the other provision was there. I am not sure about that. I haven't checked the dates on it. But I think this, that if you carry that to its logical conclusion, you could have the Interstate Commerce Commission regulating anybody that dealt with the railroad in any respect.

Judge ALLEN. Mr. Farmer, I haven't made any conclusion about this, but it is very much better for you to know what question is in the mind of the Court.

Mr. FARMER. I understand that, your Honor.

Judge ALLEN. If this statute does apply to you, I want to ask you this question: whether the cases that you cite and rely upon were dated prior to or after the enactment of the Elkins Act?

Mr. FARMER. I think all of them, as a matter of fact, were after. One of them was the General American Tank Car Corporation case, which I think was in 1940, for instance. It is in the brief, and it very clearly holds that the Commission had no jurisdiction whatever over those companies who owned cars and equipment rented to the railroad.

Incidentally, I am just informed that you were in this case that we discussed here a minute ago in which the Supreme Court holds that the Interstate Commerce Act—that was a recent decision, by the way, and I am sure subsequent to the enact-

ment of '42—the Supreme Court holds in that case, which I read to you a few moments ago, that the Interstate Commerce Act was aimed exclusively at common carriers. There wasn't any question about it.

Judge ALLEN. There isn't any question about the Elkins Act, either. That was enacted when Senator Elkins was in the Senate of the United States, in 1937 or 1938.

Mr. FARMER. Now, on page 11, I have cited the Refrigerator Car Mileage case, and you will find there that the Interstate Commerce Commission itself has held that it has no authority to regulate or to fix a price in those instances. I am speaking of people who owned cars and rented them to the railroad, like refrigerating cars. The Interstate Commerce Commission said, itself, in that case that it had no authority to regulate, and even though Congress had amended the Act, they went into a very long discussion of that.

Judge FREED. Mr. Farmer, what does that provision in the Elkins Act mean?

Mr. FARMER. I think it means, really, honestly, to merely apprise those who are interested of what is going on. That is my notion of it.

Judge FREED. To be called in order to state their position, but not to adjudicate the matter with reference to them?

168 Mr. FARMER. I don't think there is any question about it, your Honor.

With reference to that extract on Page 11 of the brief, surely a refrigerating car company furnishing equipment to a railroad is a party in interest, just as a stockyards company who, under a conventional sidetrack agreement, lets the railroad operate its cars over its track, and yet the Commission has held very definitely that it could not fix a compensation, so that if Section 42 applies in all the aspects that may be gleaned by some of them—particularly the Commission—then the Commission would have authority to go into that question of what the refrigerator car company could charge the railroads for its equipment.

There are a number of cases here. There is the case of the United States vs. Pennsylvania Railroad Company, 242 U. S. 208, which they cite here as authority for the stand they take that the stockyards company cannot be regulated.

I have just been handed, in connection with this argument, a note by one of my associates which says, "The Elkins Act is applicable to all persons, whether or not carriers. The Interstate Commerce Commission has the enforcement of the Act as to carriers. The District Court has the enforcement as to other

169 types of persons or corporations." That is the opinion of one of my associates, that the Interstate Commerce Com-

mission cannot regulate anybody but the carriers, and if there is any controversy with persons outside of common carriers, then it must be left to the judicial tribunal.

In the case of the Rex Jellico Coal Company vs. L. & N. Railroad Company, which was decided January 10, 1940, the Commission held that service over private tracks by a common carrier was neither compelled nor prohibited by the Act; that to furnish it or withhold it was within the discretion of the carrier, except that in either event the statutory inhibition against unjust discrimination, or undue prejudice, must be observed.

I might say to the Court that in 1940 the Congress amended the Act so that some of these private car companies now are subject to the jurisdiction of the Commission, that the Commission can fix the price that they receive. In that connection, if the Congress of the United States, knowing that Section 42 was in existence—Section 2 of the Elkin Act—if the Congress of the United States enacted an amendment so as to give the Commission the authority to fix the compensation to carriers, whether or not common carriers, then, if Congress had been under that opinion, it wouldn't have been necessary at all to amend the Act. They would have
170 been subject to it all the time, by Section 42. But Congress has done nothing about amending the Act so as to make a private side track of this kind subject to the Commission, when it is owned by a private company and not a common carrier.

I shall pass on now to the case of Sholl Brothers vs. Peoria & P. U. Railway Company, 276 Ill. 267, 114 N. E. 529. That is a case that is on all fours with the one in controversy here.

Judge FREED. That case was cited?

Mr. FARMER. This case was cited, in all the briefs; yes. You think it is not necessary to go into that? Is that the point?

Judge FREED. It just seems to me that it has been cited, and I read it.

Judge JONES. I don't remember it, but I can read it again.

Mr. FARMER. In that case there was an agreement entered into with the defendant, the railroad company, under the terms of which the latter agreed to put in a sidetrack for a coal mine owned by Sholl Brothers. The labor, some material, and the right of way were furnished by the Sholl Brothers. Other material was furnished by the carrier, who was also to maintain the track. The use of the track was restricted against serving other coal mines, or business which would interfere with the busi-
171 ness of Sholl Brothers. That is the situation that is involved here.

An asylum—a State institution—was built nearby and tracks were laid by it and connected with the sidetrack that Sholl Brothers had built on their land. The carrier delivered to the

asylum carloads of coal, not produced at the Sholl Brothers mine. Sholl Brothers filed a bill to enjoin delivery of the coal not mined at their mine. By way of defense, the defendant urged that the contract was void and against public policy for the reason that a common carrier had no right to contract to give the exclusive right to transfer any commodity over any part of its line.

The Court, however, said, "It must be remembered, in this connection, that the railroad company does not own the right-of-way.". That is the same situation as the stockyards. "The fee in the land and right-of-way is owned by the defendants in error, and the right of the railway company to use the tracks and right-of-way is restricted to whatever rights it has by the terms of the contract.

"The sidetrack involved in this case is not a part of the public railway of plaintiff in error. It is connected with said railway, but not a part of it, and could not become a part of the railway system of plaintiff in error, unless it be purchased or acquired by condemnation proceedings."

172 That is the situation in this case.

Judge ALLEN. Mr. Farmer, you have consumed 30 minutes.

Argument of Mr. Pierce

Mr. PIERCE. If the Court please, I have made a copy here of Exhibit No. 11 in the Interstate Commerce Commission Docket Proceeding 28714, one for each member of the Court, because I expect to refer to it in the argument.

There was quite a bit of uncertainty at the first hearing before the Commission as to just what the facts were about this track, and how service got started over to Swift's. In the first place, Swift couldn't turn up any evidence on it, and some of the records had been destroyed in the floods down at Cincinnati—some of the Big Four records. We were able to find a file, though, referring to the Peoples Packing Company, which was in the Traffic Department here at Cleveland, and that file gave quite a bit of history of how they happened to get the track to Swift & Company's plant on West 63rd Street.

As a result of the contents of that file, this Stipulation No. 11 was prepared, and that shows that in 1905 Swift bought the Peoples Packing Company, which was located down in here [indicating] at that time. It was operated as the Peoples Packing Company by a man named H. C. Thom.

173 Swift wanted to enlarge its facilities there, and they gave quite a bit of consideration to how they would get a track connection in there. In the record is an agreement of 1908 between H. C. Thom and the Big Four Railroad, which was

obtained at the instance of Swift & Company, in which a 16-foot right-of-way was obtained at the request of Swift & Company. Swift & Company had H. C. Thom working for them at the time, operating the Peoples Packing Company plant, so Thom made an agreement with the Big Four to convey a 16-foot of right-of-way all the way down the westerly side of West 63rd Street, extending from Lot 285 up here at the northerly end, down to Lot 255, where the track would serve the industries at that time.

At the same time, Swift & Company asked the Big Four to get a track connection for them up at the north end of West 63rd Street, and a permit was obtained from the City of Cleveland—the Council—to build a track across West 63rd Street up here [indicating] and to make a track connection directly with the main line right-of-way of the Big Four Railway.

The Lake Erie Provision Company enjoined that proceedings. Condemnation proceedings followed. The Court assessed the damage at $13,500 for the value of the property, which was to be taken in order for Swift to get its direct track connection up here with the Big Four, which would have given Swift all of
174 the rights to which it now claims, and as the Commission would undertake to give it under Section 1.

In 1910, Swift concluded it didn't want to pay what was necessary in order to get its own direct track connection at the north end of West 63rd Street, where it couldn't have any interruption by the stockyards or any other interests, so Swift & Company, as will be shown in this Exhibit 11, then asked the Big Four Railroad if they wouldn't get them a connection that was served by this stockyards track, along the westerly side of West 65th Street, and Swift & Company provided to the Big Four Railroad the right-of-way from this Sublot 255, across here, on over here [indicating], in order that a track could be built to Swift & Company's plant by using this bridge track.

This [indicating] is comparable to a bridge so far as livestock is concerned. It is a bridge over which cargo shipments of livestock, so far as the railroad is concerned, cannot be taken to Swift & Company's plant, because we have only a restricted use of that track.

Swift arranged all of this right-of-way in here [indicating] for the Big Four Railway, and asked them to build a track connection across here. Swift & Company obtained a permit from the City of Cleveland for the Big Four to build that track across West 65th Street.

It obtained an easement over this little Sublot 166, which
175 is shown in yellow here [indicating], and which just borders the easterly side of West 56th Street. That sublot was owned by the Cleveland Union Stock Yards Company, and Swift

& Company procured this easement over that sublot for the Big Four to build the track. One of the conditions in the easement for that little Sublot 166 was that if Swift ever gave up going over that way to get out with its traffic, that the easement would revert to the stockyards company.

This track shown in yellow [indicating] is a track owned by the stockyards. At the south end of that track, the Big Four did build, at the instance of Swift & Company, a track on down here [indicating] so that they could switch back and get across here to get to Swift & Company's plant, and the other industries that were located over there—mostly packing plants.

However, only two of those plants received the carload shipments of livestock at their plants. That was Swift & Company and Koblenzer Brothers. They were the two companies which received livestock at their plants over in this section.

This track, indicated in red here, is owned by the Big Four Railway, or the New York Central, but it was put in at the instance of Swift & Company in order to get to their track. The land is partly owned by Kreinberg and Krasny, and the Standard Beef Company.

176 When the stockyard sold this parcel of land and marked No. 8 right here [indicating] to the Standard Beef Company, it retained an easement to continue a sidetrack over there so as to permit these people down in there to have this service by rail.

The same thing happened with Kreinberg and Krasny. When the stockyards sold them land, they reserved the right for this sidetrack to be maintained over there.

Swift & Company was a stockholder in the stockyards and had its manager on the Board of Directors. Mr. Baker, President of the stockyards company, testifying before the Commission said that Swift & Company took an active part in the management of the stockyard company from 1916 to 1936; so that Swift & Company has known all the time that this was a restricted track, restricted to movement of only such commodities as the stockyards would permit to be moved over that track.

The stockyard has never objected to moving anything except carload shipments of livestock, and the objection that the stockyard made to us was that if livestock moves over this track of Swift & Company, then the stockyards does not get to unload that livestock through its unloading pens, so that, for that reason, they considered it competitive.

177 There is an exhibit in the record which shows that there was no question about what competitive traffic was understood to be by all parties concerned, and that was at the time in 1935 when the stockyards said that we should not move any more

carload shipments of livestock to Swift & Company over that track.

Prior to 1930, Swift didn't get any livestock over that track. Swift got all of its livestock through the unloading pens of the stockyards. In 1931, when the Government filed an action against Swift and compelled Swift to divest itself of ownership in stockyards, including the Cleveland Union Stock Yards, Swift then started sending some of these carload shipments of livestock directly to its plant. In other words, there was just a little bit of imposition in using the stockyards track there in order to get carload shipments over to its plant.

There were 1,116 of those cars that moved over there between 1930 and 1935. It got to be such a volume of traffic that the stockyard felt that it was affecting their revenues. In other words, it was taking stock away from the loading and unloading pens of the stockyards, and taking it directly to Swift's plant. So the stockyards said to us, under this sidetrack agreement, "You can't do that any more unless a charge is paid to the stockyards for the use of that track, for livestock." The price quoted at that time on a per head basis was $6 to $9 per car, ranging
178 all the way from 20 cents a head on cattle, on down to 5 cents, I believe, on hogs.

Then they said that some price would have to be arranged. Well, we attempted to arrange a price for the use of it. Swift & Company complained and said that they wanted their stock shipped over there, and we told them we couldn't move it over this track until they got permission from the stockyards to use this track in order to move their livestock over to the plant; that we weren't able to do anything with the stockyards, and we thought that they ought to be in a better position than we were to deal with the stockyards on that matter.

So that resulted, in 1938, in a request from the railroad—the Big Four—to all of these industries who had sidetrack agreements with us, including Swift & Company, if they would not change their sidetrack agreements. We asked them to modify the provisions of the sidetrack agreements, so as to indicate that livestock could not be moved over that track, because that was the restriction that was put upon our operation over the 1,619 feet of track.

Three of the industries came back and said, "All right. We accede to the change." Koblenzer Brothers said, "We are not moving any livestock over there now, so it doesn't make any difference to us." Two of them, Kreinberg and Krasny, and Theurer-Norton, didn't reply.

179 Swift & Company wanted to make an issue of it, apparently, because they said, while they were not using the track for moving carload shipment of livestock, that they did want

it available in case there was a fire, or strike, or something, at the stockyards. We called their attention again to the fact, as they well knew, and had known all these years, that we were helpless and couldn't guarantee them any service over that track.

Now, all of this long history—which is included partly in Exhibit 11, but in the transcript of testimony it goes back quite a ways—all of this long history was ignored by the Commission here, which was very much contrary to what was done in the long and extensive argument with the stockyards in Chicago, in which Swift & Company was a participant, along with other packers and railroads and stockyards. In the Chicago Stock Yards case, the Supreme Court of the United States held that the history of the practices that had grown up over there were indeed important in considering who was entitled to what, and where the transportation obligation of the railroad began and ended with reference to loading and unloading livestock. So it is the history in cases of this type that the Supreme Court has held is of vital importance in considering the rights to service, and what is transportation service. That case is the Supreme Court case, 316 U. S. 216,
180 referred to on page 26 of our brief.

I assume that the Court has observed the location—it is not shown on this map—of the other three packing houses which Swift claims, and the Commission says, we are discriminating against. The Long Dressed Beef is located over here north of the Big Four Railroad [indicating], and has its own private sidetrack built up to our right-of-way and connecting directly with our main tracks. That is the Long Dressed Beef.

The Ohio Provision Company is located north of the Big Four tracks and east of West 65th Street, and has its own private sidetrack, for which it paid to build it up to our right-of-way, so as to connect directly, and so that we could be compelled to serve them under Section 19 of the Interstate Commerce Act.

The Lake Erie Provision Company, located just south of our tracks, and just east of West 65th Street, likewise has its own direct track connection with the Big Four main track and right-of-way; just as Swift had its opportunity in 1908 and 1910—and the opportunity existed for years, and may yet be available for Swift; I don't know about that—they had their opportunity to get their direct track connection at the north end of West 63rd Street.

With that history, we have not been able to understand in what way the Commission legally could require the
181 railroad to provide Swift & Company with a track connection to our main line. We have been restricted in what we can move over that track. Livestock is the only thing that is taboo, and that is taboo because the owner of the track says it is competitive to the operation of the stockyards.

I should like to make sure at this point, if the Court please, that the order of the Commission is probably before the Court. I believe it was attached to the answer of the Interstate Commerce Commission.

Mr. REIDY. Yes; it has been amended since then. It has been extended now, as Judge Jones perhaps is aware, until the 1st of June, but we are perfectly willing to supplement the record to show that.

Judge JONES. I didn't send notice to the parties about that because it was purely for the Court's benefit, to give ample time to consider the case, without changing the hearing date. The Commission responded and has extended the effective date, but not for any purpose other than the convenience of the Court.

Mr. PIERCE. Thank you very much.

I just wanted to be sure that the order was in the record properly.

Judge JONES. That is the amendment; yes.

Mr. PIERCE. I should like to say, without further discus-
182 sion at this time, that we have discussed at length the law which we think is most likely to be applicable under the circumstances here. We doubt if there is anything that is just on all fours with this situation, but we have just cited the cases which the Commission ignored in its consideration, and in its order there isn't any reference made to any citation of the railroad plaintiff's at all—not one citation being used. The railroad's contentions here apparently were just brushed aside, with the idea that Swift & Company must have service over that track. So we have cited these cases in our brief, and I would like to save any time that may remain for rebuttal.

Mr. REIDY. It may be that Swift & Company might want about 15 or 20 minutes.

Judge ALLEN. You are speaking both for the Interstate Commerce Commission and the United States?

Mr. REIDY. Yes.

Judge JONES. We will take a little recess.

(Recess.)

Argument of Mr. Reidy

Mr. REIDY. If your Honors please, when the railroads filed this suit and copies of the Bill of Complaint were served upon the Commission, we were somewhat surprised that the railroads had attacked the order of the Commission, in view of the expostulations made by their counsel before the Commission, which are quoted on page 70 of the Commission's report in this case.
183 Mr. Pierce, in arguing the case to the Commission, said:
"It does not make any difference to the New York Central

whether this stock is placed at the stockyards unloading pens, or whether it is placed over at Swift & Company's plant. We stand ready to deliver at either place, but because of the barrier placed on this by the stockyard, the owner of the track, we are just not able to deliver over there."

In their brief that they have filed in this case, at page 29, they in effect reiterate that same statement. That is at page 29 of the plaintiff's brief, the last full paragraph on that page, beginning with the fourth line in that paragraph. They say: "Plaintiffs stand ready and willing to deliver carload shipments of livestock to Swift's plant whenever Swift can make satisfactory arrangements with Stock Yards for the use of its 1,619 feet of track or whenever Swift can conform to the provisions of Section 1 (9) of the Act and construct its private sidetrack to the right-of-way line of New York Central's railroad property."

It looks very much to me, from those two statements, that the railroad is attempting to take advantage of an order that is more primarily directed against the Cleveland Union Stock Yards Company. If it has any merit at all, it certainly doesn't
184 seem to have any with respect to the railroad companies, over whom it must be conceded that the Interstate Commerce Commission has jurisdiction of the most complete character.

It is well recognized by the Supreme Court of the United States—and I have not cited this case in my brief as it is a new case that I just read this morning—in the case of the Interstate Commerce Commission against Chicago, Rock Island & Pacific Railway Company, 218 U. S. 88, at page 109. The Supreme Court said that, "The companies"—meaning the railroad companies—"may complain of the reduction made by the Commission so far as it affects their revenues as one thing; to complain of it as it may affect shippers or trade centers is another." We have said several times that we will not listen to a party who complains of a grievance which is not his. I am citing that case in support of that last holding.

Judge ALLEN. What page is that, Mr. Reidy?

Mr. REIDY. That is quoted on page 109.

The facts are pretty well understood by the Court, and it is unnecessary to go into them to any great extent, but the essential proposition is that we have seven industries out on the end of this line, beyond the track of the Cleveland Union Stock Yards Company, which, unless this order is sustained, will be deprived
185 of common-carrier service, and their products will not be able to reach the outside world, or products from the outside world will not be able to come into those plants.

The Interstate Commerce Act was passed originally in 1887, as your Honors probably know, and has been amended from time

to time, and it now constitutes a volume of this size [indicating] of over 200 pages. During those 60 years, it would indeed be surprising if, in the constantly expanding nature of the law as to the Commission, that Congress had not taken care of a situation such as this, and prevented any such failure on the part of the carriers and others from according service to industries so dependent upon them for service.

As your Honor, Judge Allen, has pointed out, certainly with respect to the Cleveland Stock Yards Company, the wording of the Elkins Act, giving words their ordinary use, certainly covers a situation of this kind: "In any proceeding for the enforcement of the provisions of the statutes relating to Interstate Commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any District Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by
186 the rate, regulation, or practice under consideration," and then it provides that decrees may be entered against those parties.

Of necessity, that must mean proceedings before the Commission, because the Commission is the only body that can pass on the reasonableness of a rate or a regulation, or a practice. The Supreme Court has said time and time again, that under the primary jurisdiction doctrine, when a question involving the reasonableness of a rate, a regulation, or practice, is brought to the Court in the first instance, it will decline to pass on it and refer the matter to the Interstate Commerce Commission for expert judgment of that body upon the matter. So that I say, of necessity, as the language of the statute, of course, shows, it does apply to proceedings before the Commission.

With respect to the contention that the Act is confined largely or solely to carriers, I have already cited at page 97 of the Government's brief in this case, the case of Terminal Warehouse against Pennsylvania Railroad Company, 297 U. S. 500, 514, where Mr. Justice Cardozo—I think we will all agree that his opinions are entitled to weight—said: "The Commerce Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion,
187 it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive."

The Commission in this case has found—and we think quite properly—that this Track 1619 is so essential to the service of

several industries who are located unfortunately beyond that track, that it is an essential link in the New York Central System, and it being an essential link in the New York Central System, of course, the New York Central cannot enter into any contract as a common carrier which in any way abrogates the provisions of the Interstate Commerce Act.

Perhaps the leading case on that is the L. & N. against Mottley, 219 U. S. 347, which I have set forth in my brief. In that case, Mr. and Mrs. Mottley had been injured by a wreck on a Louisville & Nashville train, and in 1871, prior to the Interstate Commerce Act, in settlement of their injuries, the railroad agreed to give them—and they agreed to accept—free passes over that line and all its branches during the rest of their lives. When the Interstate Commerce Act was amended in 1906, it forbade the issuance of free passes in that kind of a case, and thereafter
188 the railroad declined to renew the passes, and the Mottleys brought suit in court for the enforcement of it, and it went to the Supreme Court, and the Supreme Court said that while the case would result in great hardship to the Mottleys, nevertheless, that was the policy of Congress, and that Congress had, as a matter of policy, forbidden the making of such agreements, and the fact that they were made prior to the effective date of the Act did not excuse or preclude Congress from acting on them. Otherwise, as Justice Hughes said, the parties by prophetic discernment could remove themselves from future legislation. For example, in the last annual report that the Interstate Commerce Commission has made to Congress, acting under the mandate imposed on it by Section 21 of the Interstate Commerce Act, they have made seventeen recommendations for legislation. The annual report is a public document and everybody can get copies of it, and be familiar with those recommendations. Now, of course, it goes without saying that no one who reads those recommendations for legislation could anticipate that Congress may act favorably on those recommendations and then agree that if this law is passed, or those laws are passed, that they could excuse themselves or relieve themselves from it.

Just as in the Morgan case, while the question there involves a small and unimportant railroad—I don't mean by that
189 that the New York Central is a small and unimportant railroad—the issues are relatively simple, but we think the principles that result from these issues are far reaching, applying as it would, to situations all over the United States.

It is well recognized in the Interstate Commerce Act itself, in the very definition of "railroad," which is set forth on page 106 of our brief, that the railroads don't own all the miles of track over which they operate. There are a good many miles of rail-

road in this country where they operate under trackage rights, and perhaps over private facilities of other than railroad companies, and that is recognized by the very definition of "railroads."

In the middle of page 106 it says: "The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating the railroad,"—and the following words are the significant words: "whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

It would be difficult to find language much broader
190 than that definition of railroads.

In the case of Alton Railroad vs. Illinois Commission, 305 U. S. 548, cited on page 90 of the Government's brief, the Supreme Court there said specifically: "The appellant"—that is, the railroad company—"maintains that by compelling it to expend its funds for the upkeep of a track not constructed or owned by it"—note those words, "or owned by it"—"and upon land it does not own, the order is repugnant to that provision of the Constitution."

In deciding that case, the Court said, "A track that has become a part of the main line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used with extensions if any shall be made, to serve the public at large." That language shows that it isn't necessary for the railroads to use every mile of track over which they operate.

The facts with respect to the construction and maintenance of Track 1619 and the assessment of the extra charge of $6 to $9 per car, if the tracks of the Union Stock Yards are used to complete the common carrier's service to Swift & Company, are all fully covered in the Commission's report and need not be referred to here.

191 There is no question in this case, and I don't see how there could be any, as to a full hearing having been accorded. The Commission had, in fact, two arguments before it, as well as two hearings before their examiners, and the matter was threshed out very fully in briefs and examinations.

Judge Jones. Mr. Reidy, I don't want to interrupt you more than necessary, but there is, since you mentioned it, a gap in the opinion of the Commission, as I see it, in this respect: If it has jurisdiction of the stockyards company and power to order it, as

it can readily do so, what consideration was given to the question of the cost to the railroad in performing the service over the private track, in relation to the preferential treatment of Swift & Company over others who had their own switch connections to the railroad? I am referring to these other companies who have stockyards that are served by private sidings.

Mr. REDY. Your Honor's question, I think, goes directly to the finding of the Commission as to a violation of Section 3 (1), the unjust discrimination, under the undue preference section of the Interstate Commerce Act. The Commission also made findings as to violation of Section 1 (9) relating to the maintenance and operation and building by railroads of switch connections.

It is not enough for a railroad to just build a switch con-
192 nection, but it has got to maintain and operate it.

Judge JONES. Does that include a payment to the owner of the track, and is that passed on to the person served, or is that absorbed by the railroad? And is the railroad, in that situation, compelled to absorb the extra cost of serving Swift & Company? If that is true, wouldn't that result in a beneficial preference to Swift in violation of the law? There is a gap that I didn't think the Commission's report covered there, and here is what was in my mind: if, as you contend, the Commission has jurisdiction over the stockyard company in this dispute, and has the power to include in its order the performance by the stockyards, in harmony with that imposed upon the railroad, then would not the Commission have the power to determine at what price the stockyards should give that service to the railroad? I couldn't get away from the proposition that if the additional cost was added to the railroad's burden of serving Swift & Company, and it had to absorb that and still deliver livestock to Swift by the same line haul charges as it did to others who had the private switches, you would end up with that in dispute.

Mr. REDY. I understand that. The railroads have that completely within their sole and exclusive power to correct, your Honor, and they haven't taken that step here.

193 Now, for that added or extra cost of performing this service, they could have filed with the Interstate Commerce Commission a new tariff, naming whatever increased cost they figured they would incur by using this track, and that tariff, if it had been protested by Swift as resulting in an unreasonable rate, nevertheless, the Commission has the discretion to permit the increased tariff to go into effect at once, or, what quite often happens, following the filing of a protest, it conducts an investigation into the reasonableness of that rate.

Now, we don't say—and I want to make that very plain; and I am glad Your Honor brought it up, because I am afraid I might

have missed it, otherwise—that the Cleveland Union Stock Yards Company is not entitled to just compensation for the use of the track. What we do say is that that just compensation for the use of that track is not to be levied solely against livestock. There are all forms of transportation and traffic that use that track, and it could be prorated—whatever the value was to the stockyards company and the railroads using that track—and could be dealt with in the nature of awarding just compensation. We think that is within the authority of the Commission.

Judge JONES. One more question, and then I will cease: if the railroad did file a subsequent tariff and the Union Stock
194 Yards protested it, would the Commission have the power to determine whether the tariff filed was a compensatory rate, and would the stockyards be bound by it?

Mr. REIDY. Yes. They would, unless they got the Court to set the order aside. That is covered, I might say, by the provisions of 15 (7) of the Interstate Commerce Act, which we haven't cited in our brief, although we have cited pretty nearly every other section.

Judge FREED. May I ask you this question: What do you say about the comment made by the Commission as to the right of the Union Stock Yards to withdraw that trackage from public use?

Mr. REIDY. I say, that was just in the nature of an aside. There wasn't any such question.

Judge FREED. Do they have such right?

Mr. REIDY. I don't think they have the right, myself. Certainly, if the Interstate Commerce Act is not broad enough to stop them, if the Interstate Commerce Commission is excluded by Section 1 (22) which Mr. Farmer referred to, which provides that spur, industrial, team, switching or sidetracks are not within the jurisdiction of the Commission, then the Ohio Commission could step in, because they are operating under a somewhat analagous statute as to intrastate commerce. I think either one or the other could stop it, but the Commission never reached that point, and I think Your Honor will see why it couldn't.
195 Here was an effort to single out livestock. It wasn't a complete obliteration or wiping out.

Judge FREED. I appreciate that, but there is a reference in the Commission's report, twice, to the fact that they do not decide the question, whether or not these Union Stock Yards have a right to withdraw that trackage entirely from public use. Now, I did want to get your answer as to the question, whether they do or do not, in view of the provisions of these series of agreements between the New York Central and the Union Stock Yards. In each one of those there is reserved the right to cancel, or to terminate the contract or agreement for usage of that trackage on either

30-day or 60-day notice. I assume that that is the reason why the Commission in its report made some reference, without deciding it, to the right of the Union Stock Yards to withdraw that trackage from public use.

Mr. REIDY. That agreement was between the Union Stock Yards Company and the New York Central Railroad Company, of course. We take the position that, whatever the rights of the Cleveland Union Stock Yards Company, the New York Central Railroad Company certainly had no right to enter into any such agreement and deprive the public of a service so essential to it.

The New York Central has gotten itself into this situa-
196 tion by entering into a contract beyond its powers. The Cleveland Union Stock Yards Company, also, was a defendant before the Commission and took a very active part in those proceedings and advanced substantially the same argument to the Commission that they are today advancing to the Court. They weren't taken by any surprise in this Court. They were named as a defendant and they filed a separate Bill of Complaint here, so that any decree that the Court enters can run against the stockyards company as well as the railroad.

Does that answer your question, Judge Freed?

Judge FREED: That answers your view of it.

Mr. REIDY. The Commission, in this case, made findings of the violation of Sections 1 (9), 3 (1), and 1 (6).

Section 1 (9) requires the railroads, when a shipper tenders interstate traffic to it for transportation, to construct, maintain, and operate, a switch so that the shipper who builds his plant back from the main line or branch line of the railroad will have access to the outside world. It is significant in that connection that the carrier is required to maintain and operate that track without discrimination, and the word "discrimination" is not modified in any way, like Section 3 of the Act is, by the use of an adjective such as "undue" or "unreasonable." It forbids all forms of discrimination.

We regard that as a rather important section of the
197 Interstate Commerce Act, and the Commission was quite hopeful that the Court would discuss the importance of that section in its opinion. We feel it is a section that has not been used as much as it could, and as this case probably will go to the Supreme Court, we would like to make Section 1 (9) mean something. It enunciates a principle of law that would be applicable generally.

Take the finding of the Commission as to a violation of 1 (6), an unreasonable practice, or 3 (1), unjust discrimination. The Commission, in those cases, has to proceed case by case. They find a violation of Section 3 (1) in a situation here in Cleveland,

and after investigation they correct that; then someone complains about a situation at Akron, and after investigation they correct that; and they have to go like that all over the country whereas under Section 1 (9), if it is the duty of the carrier to maintain and operate this switch connection, as we think it is, that that is a principle of law that applies generally and would greatly facilitate the work of the Commission in the manifold duties imposed upon it.

In view of the fact that Section 3 (1) seems to be so heavily leaned upon by the dissenting Commissioner, it seems as if a word with respect to that section is advisable. Your Honors will observe from the map that I have handed up to you that there are
198 three provision companies: The Lake Erie, right along the main line of the New York Central, to the right of the map; then the Ohio Provision Company, and Long Dressed Beef Company. It is obvious from the map and from the physical lay-out that these three plants do not have to use the disputed 1,619 feet, and therefore the plaintiffs contend in this case that the circumstances and conditions are dissimilar and that there is no basis for the finding of a violation of Section 3. We point out that the words, "under substantially similar conditions and circumstances," do not in fact occur in Section 3 of the Act, which the Commission found violated in this case, although they do occur in Section 2, concerning which the Commission made no such finding.

The fact that these three so-called preferred plants do not have to use Track 1619 was a factor to be considered by the Commission along with others, in determining whether or not there was a violation of that section, and the Commission found that these three preferred packing houses were in competition and frequently had bought their livestock usually in the same origin point, and sold it in the same destinations, as Swift and the other plants who have to use Track 1619, and by those six or seven plants having to pay the extra charge of $6 or $9 a car, that they do in fact enjoy, or have imposed upon them, a prejudice, and the other
199 packing houses have a preference that warranted the Commission in making its finding as to a violation of Section 3 (1).

The decisions of the Supreme Court are so numerous that it would be tiresome to repeat them, but these questions of discrimination and unreasonableness of a practice are so administrative in nature that the Court has rightly ascribed to the judgment of the Commission great weight in the determination of those questions.

Certainly, where Swift and these other companies have to pay $6 or $9 more for a carload of livestock, depending on whether it is a single or double-deck car, and these other three plants get them without that charge, to the uninitiated it seems that would

be a discrimination. When the Commission makes a finding on that, it seems to me it makes it well nigh conclusive.

The same may be said with respect to the finding of Section 1 (6), which relates to unjust and unreasonable practices. In connection with a similar finding made by the Commission in another case, the Supreme Court, in 230 U. S. 247, said; "But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the Courts
200 should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the Courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice." That is in the brief.

I think I have touched all the principles of law in this case that are important, unless there is something that occurs to your Honors.

We have filed a rather lengthy brief here, considering the importance of the case. I hope your Honors will not consider it too long, and unless you have some questions I will conclude.

Argument of Mr. Rynder

Mr. RYNDER. If it please the Court, I am representing Swift & Company, who was the complainant before the Commission in this case, and I shall not attempt, I hope, to duplicate anything that has been said on either side.

I did want to say a word, if I may, in connection with the question asked by his Honor, Judge Jones, about just compensation for this track.

I think the Commission says in its opinion that the stockyards is undoubtedly entitled to just compensation for that track. I don't question it, certainly, but Swift is not using it. The New York Central is using it. Now, if the New York Central
201 needs additional compensation for the use of that track, the means is open to it, and it necessarily involves the primary jurisdiction of the Commission.

As Mr. Reidy has stated, the New York Central may file a tariff, naming something more than this line haul rate, for deliveries of livestock and other freight to these other industries, and the Commission would undoubtedly determine, as it has determined in a number of similar cases, whether the proposed charge was reasonable, and we would be bound by that decision, of course, whatever it might be.

I say that it did not come before the Court at this time as an initial matter, because it evidently requires the primary jurisdiction of the Commission, but I did want to mention one more point in that connection, as to whether or not the stockyards has already been receiving compensation. You perhaps recall that the first contract, shown in one of the exhibits in this case, provided that the stockyards company would pay the maintenance cost of all the tracks, but an amendment of that contract, which I believe was made in 1924, and which I think is Exhibit 11 in the record before you, provided that the railroad company would take over maintenance of all of the stockyards' tracks, which it did at that time, and has done ever since, including all of these tracks which are used solely for stockyard purposes.

Under several decisions, which we have cited in our brief,
202 the maintenance by the railroad over the years of those tracks, for another industry, is strictly forbidden by the Interstate Commerce Act, and the decisions of the Commission, unless the railroad is receiving something in the way of public service out of it, which would justify what it is doing. So I would like to call your attention to the fact that up to this time—at least since 1924—the stockyards company has been receiving a compensation which it could have received in the way of maintenance of all of these tracks, only upon the theory that it was giving the New York Central something in the way of the use of its tracks for a common carrier purpose.

I think that the Commission properly did not pass upon the question whether the track would be abandoned in its entirety, and I do not believe that this Court, under the present condition of the record, will attempt to pass upon that question, because it was not before the Commission at the time the case was decided, and I think the validity of the order of the Commission must be sustained upon the record as it stood when the case was closed.

Everybody was given an opportunity to put in all of their facts, and there had been no suggestion at that time of abandonment of the track. If that question should arise, that will again bring into play the primary jurisdiction doctrine, either with respect to the Interstate Commerce Commission, or with respect to
203 the Public Utilities Commission of this State. I will not go into it in detail, except to state that that is where we would have to go. If the Interstate Commerce Commission loses jurisdiction over the abandonment of a track—of which I am not too sure—under Paragraph 22 of Section 1 of the Federal Act, you will find that the Public Utilities Act of the State of Ohio provides as follows: "The Commission shall have the same control over private tracks, so far as such tracks are used by common

carriers in connection with a railroad for the transportation of freight as it has over the track of such railroad."

Mr. PIERCE. I would like to object at this point, if you please, to any reference to Ohio Law here. As I understand it, Mr. Rynder is proceeding under the provisions of the Interstate Commerce Act and his rights under that Act.

Judge ALLEN. You may proceed. If you gentlemen bring something extraneous into the argument, the Court will disregard it.

Mr. RYNDER. I am merely suggesting, if it please the Court and Mr. Pierce, that that question is one that we would have to take up.

Judge ALLEN. This is argument and not evidence; that is the distinction. Proceed.

204 Mr. RYNDER. As I have listened to the argument, it seems to me that I have not heard the railroad plaintiffs make any argument on their own behalf, but only an argument on behalf of the stockyards. Certainly there is nothing in this order that could injure, damage, or otherwise bring any unlawful result to the New York Central. As I get the position of the New York Central, upon its complaint in this case, and from the brief, it says: "We will be forced to make an unlawful trespass upon the stockyards' property. The stockyards can come and sue and resue and keep on suing us for damages," and this, and that, and the other thing.

That brings me to this point: I think that if the order is valid as against the stockyards, then the railroad has stated no case, because the railroad would not be a trespasser on the property of the stockyards, if the stockyards was bound by this order. Neither could the stockyards proceed to repeat its suits for damages against the railroad, because it was obeying this order, if the stockyards was bound by this order. That would be a collateral attack upon the order, which would not be permitted.

When I filed the complaint with the Commission, I made the stockyards a party defendant, and designed it under the provisions of the Elkins Act, to which your Honors have called attention this morning.

205 I see no reason to believe that that section of the Elkins Act does not mean literally what it says, and I believe the decisions under it sustain that position. They have not been many, but the earliest I could find was United States against Milwaukee Refrigerator Transit Company, 145 Fed. 107, in which the Transit Company, apparently a car company furnishing cars and not a common carrier by railroad, was giving some kind of a rebate. The Court issued a decree restraining that company, not a common carrier by railroad, from continuing that practice of rebates.

The Elkins Act refers not only to a decree of a Court, but to orders of the Commission in any proceeding before it. I could see no reason why, if the proceeding had happened to be before the Commission, it could not have entered an order that would have been the exact equivalent of the decree ordered by the Court in this case.

I will not stop to try your patience with all of the cases cited in my brief but it seems to me another one very much in point is Spencer Kellogg vs. United States, 20 Fed. (2d) 459. Certiorari was denied in that case. Here was the situation: It was alleged—and I assume proved—that Spencer Kellogg, which operated grain elevators in Buffalo, received an elevation allowance of one cent per bushel from the railroads which took the grain out of the elevators at Buffalo and carried it to the East. That was
206 given to Spencer Kellogg—and properly—for its service in elevating grain and holding it for the railroads. According to the decision, Spencer Kellogg tried to get more business for its elevator. It divided that one-cent allowance with shippers in the West, and advertised that if shippers would send their grain through that elevator, they would let them have one-half cent a bushel. That case was an indictment and the indictment was held good.

Spencer Kellogg, in that case, was not a common carrier by railroad, and that case, I think, is illuminating because, as the decision indicates, it all turns upon whether, under the Elkins Act, Spencer Kellogg could be held responsible for a violation of a provision of the Interstate Commerce Act, although it was not a common carrier by railroad, and although it was neither the shipper nor the receiver of the grain; but the Court held that it was guilty of a violation of the Act, and, as I say, certiorari was denied.

I come down to the last case on that subject, which is one that was mentioned by my friend, Mr. Farmer, but which I believe has been slightly misunderstood by him. That is the litigation that commenced in the Supreme Court, General American Tank Car Corporation against El Dorado Terminal Company, 308 U. S. 422. Here is what happened: The General American Tank Car Corporation, not a common carrier by railroad, engaged
207 solely in leasing tank cars—I think generally to shippers—had a contract with the El Dorado Company out in California, by which it charged that company a certain number of dollars per day or per month for the use of its cars, and agreed to give the company all the mileage that the tank-car company, not a common carrier by railroad, received from the railroads, for the use of the cars. As it turned out, over a period of time the mileage received by the tank-car company exceeded the rental paid by the El Dorado Company, and the tank-car company reached the con-

clusion that it was an unlawful arrangement for it to be giving that railroad money to the El Dorado Company. It refused to continue the payments of the excess over the rental, and it was sued by the El Dorado Company in the District Court in California.

When the case got to the Supreme Court, the Supreme Court held that it was a matter involving the primary jurisdiction of the Commission, and that when that stage had been reached in the litigation, the Court should have stayed its hand until there had been a finding by the Commission. It sent the case back, not to be dismissed, but simply to be held until the Commission should make its finding. The proceedings were then moved over to the Commission and the Commission did make its findings and allowances for privately owned tank cars—258 I. C. C. 371—in which it
208 held that it would be unlawful for the tank-car company to pay to the El Dorado Company a greater amount than the El Dorado Company paid to the tank-car company for the rental of the tanks. That was sustained in a very recent decision, in El Dorado Oil Works vs. United States. I haven't a United States citation yet. It is in the advance sheets, Volume 90, the Lawyer's Edition, No. 13, page 821.

There, plainly, was a case where the Commission made an order effective and for the purpose of carrying out the terms of the Interstate Commerce Act, which was operating solely against a person who plainly was not a common carrier by railroad, as defined in the Act. I believe that the action of the Commission in that connection was valid, and as it was sustained by the Supreme Court, it could only have been under these provisions of the Elkins Act.

It seems to me, therefore, as if the case almost depends in its entirety upon whether this order of the Commission is valid as applied to the stockyards company, and upon the record as made up to the time the case was submitted to the Commission for decision.

I thank your Honors.

Judge ALLEN. The Court will recess until 2 o'clock.

(Recess.)

Argument of Mr. Farmer

209 Mr. FARMER. If the Court please, just a few moments I should like to devote to answering some of the arguments that were made by the Interstate Commerce Commission and by the attorney for Swift & Company.

First of all, the attorney for Swift & Company waved the magic wand here in some unique method of trying to show that the stockyards company receives compensation. He pointed out a lot

of railroads over here [indicating] which he said the New York Central Railroad maintained for the benefit of the stockyard company.

Now, in point of fact, those tracks belong to the New York Central Railroad, so that there could be no compensation derived by the stockyard company for a track over in this section that belongs to the railroad company, itself, and they are maintaining their own tracks, obviously. I want to point out again that Swift & Company had its opportunity. This has been pointed out by Mr. Pierce very graphically; and much negotiations have gone on to make a direct connection with the main line of the New York Central down here [indicating] by use of 33rd Street, but it cost them some $13,000, as I remember the figure, and they didn't want to spend that. They would rather impose the obligation of furnishing a track facility upon the stockyards company, and not only have them pay for it—not only use their own land and track—but pass by the stockyards' bins upon which the
210 stockyards company gets an unloading charge, that was mentioned by the Commission.

It was pointed out by Swift & Company that the New York Central now bears the expense of unloading livestock at $1.25 a single deck, and $2.50 a double deck. I believe this Court knows that for small animals they have two decks, frequently, in stockyards. So, depending upon whether it is a two deck or a single deck, the Cleveland Union Stock Yards Company presently, for all this livestock shipped across here [indicating], enjoys for an unloading charge, $1.25.

It is true that the New York Central would avoid the payment of that unloading charge, being its obligation to unload, but nobody suggested—not even Swift & Company; nor does the Interstate Commerce Commission suggest—that every time a double-deck car passes on our track to Swift & Company, there goes $2.50, and every time a single deck passes, there goes $1.25, which the Interstate Commerce Commission ruthlessly orders us to pass up in order that Swift & Company may enjoy our track facilities. That is the real situation here.

Then they talk about the Elkins Act, Section 42 and Title 49. So far as I know, there has never been invoked that section of the Act against somebody outside of a common carrier that is an interested party, except in cases where a rebate is involved,
211 and Mr. Rynder pointed out to you in the Spencer Kellogg case that that was a rebate. Yes, and it was a criminal action, and that is how seriously Congress regards rebates or anybody who participates in a rebate. That is how seriously Congress regarded it. They enacted criminal statutes on it. These people

gave a rebate to the shipper and they got caught in the criminal statute. So far as I know, the only time that this Act was invoked is where some interested party had something to do with granting a rebate, or sharing in it, or connected with it.

Let's assume, just for the moment, that there is another case. I say to this Court that I verily believe—and I think that the decisions that I have quoted in this brief bear out the statement—that Congress could not delegate to the Interstate Commerce Commission the right to fix the compensation for a party outside of a common carrier. To do so would be confiscation. It would be appropriating property without due process of law, and I have cited a number of cases here to the effect that that is left to the Courts, and I should like to read just a moment from the case of Baltimore & Ohio Railroad Company vs. The United States. That involved some division of rates, and the Interstate Commerce Commission, as I recollect it now, gave a free use to some small railroads. But anyhow, it was a decision of rates which the Baltimore & Ohio and other carriers considered confiscatory, and here is what
212 the Supreme Court of the United States has to say on that subject: "There is a wide and fundamental difference between the question whether the Commission in prescribing the divisions found by it to be just, reasonable, and equitable, complied with the procedural requirements of the act." And then, further, "Congress is without power conclusively to bind the carriers." That is not a private person, but a carrier. "As the Congress itself could not be, so it cannot make its agents be." The Interstate Commerce Commission has been delegated its authority. It certainly does not stand beyond or above the Congress of the United States.

Speaking of the Constitutional question, I can't refrain from telling a little story about Mr. Paul Howland, who is known to all of you, who died some three years ago, one time a Congressman from one of the Cleveland districts, one time President of the Bar Association, and at all times a distinguished citizen and a gentleman. In any event, he attended a committee meeting of the United States Senate and they were all seated in this committee room at a big table, a number of the United States Senators, and there was a long table and Mr. Howland was sitting at the upper end. A Constitutional question came up that made it necessary to refer to the Constitution; so they had the clerks, and the secretary, and all the flunkies around the Senate looking for the Constitution,
213 and they couldn't find it. Mr. Howland sat back there, with some degree of contentment, and finally reached into his vest pocket and he pulled out a little memorandum book, such as you buy at the 5 & 10 cent store, and he slid it down the length

of this long table, and he said, "Gentlemen, there is the Constitution of the United States—what is left of it." They were very much tickled at that.

The point I was trying to make is that as far as the Commission is concerned, and as far as the attorneys representing the defendant here are concerned, they seem to think that the Constitution of the United States has simply passed out of existence. There is nothing that curbs their power, but that they can usurp at will the authority of the Court.

Judge ALLEN. Is that case cited in the brief, Mr. Farmer?

Mr. FARMER. Yes; it is, your Honor.

I would like to give you the case of the St. Joseph Stock Yards Company, 80 L. Ed. 1033, which develops at length the question of confiscatory acts.

Judge FREED. What page is that, Mr. Farmer?

Mr. FARMER. 80 L. Ed. 1033.

The Alton Railroad case, that Mr. Rynder, I think it was,
214 cited as being in point here, has nothing whatever to do with this case, because that was an instance in which the statute and the decisions of the Supreme Court of Illinois was concerned. and the case followed the Illinois decisions, as it usually does in a Constitutional question arising in the state.

Now, Nebraska had a law that railroad property—a railroad track—was a public highway, and the railroad company had permitted a couple of grain associations—associations of farmers—to build two grain elevators on the right-of-way. A third association endeavored to obtain a right to build, and the railroad would not permit it. They finally got into Court, and the question there was undue prejudice and discrimination. I shall not read all of that case, but this is what the Supreme Court of the United States said: "This Court, confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining an elevator upon it, was in essence and at best a taking of private property of the railroad for private use of the petitioners. The taking by a State of the private property of one person or a corporation without the owner's consent, for the private use of another, is not due
215 process of law and is in violation with the 14th Amendment of the Constitution." I think I am correctly stating it, that under the Constitution of the United States no private property can be taken for private use without the consent of the owner, and that under no circumstances may it be taken for public use without just compensation. Those are two requirements of the Constitution of the United States.

I believe that in this particular case the appropriation of the Cleveland Union Stock Yards property by order of the Interstate Commerce Commission takes property for the private use of Swift & Company.

The other packers there have raised no protest about this thing. They are satisfied with it. They are enjoying the movement of all classes of freight, by the consent of the stockyards company, on that property, except livestock, and I believe it is within the common, ordinary realm of business prudence for the stockyards to protect its business by not permitting them to use that track for delivery of livestock when, by the use of the stockyards track, they pass by the stockyards company and make a direct delivery.

It was pointed out what the stockyards would lose on unloading alone, to say nothing of the yardage charges and other services that are rendered on a shipment of livestock.

216 Now, argument down before the Commissioner has been introduced here and I am reading now from the stenographer's minutes before the Interstate Commerce Commission when this case was argued on October 3, 1945. Mr. Rynder, representing Swift & Company, on page 348, had this to say: "Now, you will notice this correspondence they have talked about"— that is, correspondence between the New York Central and Swift & Company—"and I think the railroad is the only person whom I have a remedy against here." It seems to me that when the attorneys for Swift & Company made that statement in the argument before the Interstate Commerce Commission, that it is somewhat significant, and it is somewhat on our side of this case.

Judge JONES. In passing, Mr. Farmer, I want one reaction from you on this question: when you open your tracks to the use of the carrier for the purpose of serving shippers or receivers of commodities transported by rail, can you put any limitation upon the parties or the character of the shipments for the benefit of which the track is used by the railroad in performing its common-carrier duty, so long as such service and use is practicable and can be made in safety?

Mr. FARMER. Yes, your Honor; I think we can. I think it is that Illinois case that I quoted. That is exactly what hap-

217 pened there. I believe the judiciary of the State of Illinois are very highly respected throughout the United States. The Supreme Court of Illinois said that it could be done. Now, it was done in our case.

Now, that leads me to this observation, that the Commission has twice—and Judge Freed asked a question on this—indicated in its opinion that this track may be withdrawn entirely from use. We should hate to do that. We don't want to do it, because they do have a large amount of shipment of other things, salt, hides,

processed meats; and so forth. The processed meats, of course, are beneficial to the stockyards because it means that they have bought at least some of those animals through the yards, and we are willing to let them do that, but I don't think that we can be compelled to let them have the track when it interferes with our business and takes revenue away from us.

Let's suppose that it is illegal. I don't concede that, because I think it is perfectly legal. But let's suppose they say, "You can withdraw it from use for all time." I say that it would be regretted because Swift & Company would lose much that they have out there in the way of transportation of other things—coal, for instance, which they use in their plant. But suppose we do. Then, it seems to me, that it is up to the stockyards company to exercise its right to cancel that contract, and that is all that they can do. They can't order us to go ahead with it.

218 I may say to the Court that we have done that. We have written to the New York Central Railroad, because we felt that that was the only thing we could do, and we have canceled that under the agreement, as it stands now, effective as of May 17, 1947, at midnight. The New York Central attached a copy of that letter to its petition, and I don't know that it is necessary to make a formal offer of our carbon copy which was receipted by the New York Central, or not. It is primary record, so if I may, by reference, introduce that letter canceling the contract, on this record, I do so now.

Judge ALLEN. Any objection?

Mr. REIDY. That is a letter after the proceedings closed? Yes; we do object to it, if your Honors please.

Judge ALLEN. The Court has announced the opinion that it is not admissible, Mr. Farmer, if it is something that occurred afterwards.

Mr. FARMER. Very well. Preserve the exception.

Continuing from this case [indicating]: "If, as to the value of its property, the owner accepts legislative or administrative determinations, or challenges them merely upon the ground that they were not made in accordance with the statute covering a subordinate agent, no Constitutional question arises, but when he appropriately invokes a just compensation clause, he is en-

219 titled to a judicial determination of the amount."

Judge ALLEN. Which is this?

Mr. FARMER. That is that Baltimore & Ohio case.

Judge ALLEN. That is cited in the brief?

Mr. FARMER. That is cited in the brief. It seems to me that in this whole thing the Commission has got the cart before the horse. Before they can tell the stockyards company that it must go ahead and furnish its sidetrack, there must be some provision made for

proper compensation. They have admitted here in argument that the stockyard company was entitled to compensation, but nothing said as to what it shall be, or nothing fixed. In any event, it hasn't been done, and we are ordered to furnish our track in order that Swift & Company may be serviced through the New York Central.

I say that the Commission has indicated its own weak position in this whole thing by saying that we can withdraw. I would like to read another citation.

Judge ALLEN. We are going to read your brief.

Mr. FARMER. I am not going to read any brief. I was just going to read that order, and I hope this Court will determine what it means, because I don't think anybody of ordinary intelligence, at least, can read it and understand just exactly what
220 the stockyards company is to do, or what is to become of the property. I thank you.

Argument of Mr. Pierce

Mr. PIERCE. If the Court please, I would like to reply to several remarks which have been made here, on behalf of the railroad plaintiffs in this action.

Mr. Rynder says that the order will not do any harm to the railroads. The order will do harm to the railroads. Five of these railroad plaintiffs have no connecting track of any kind with the Swift & Company, or the stockyards' facilities, yet they are ordered to provide a switch connection with Swift & Company's track. That is an impossibility for those five railroads. If we attempt to comply with it, I don't know how we could do it, or what we would do to comply with it.

We would first have to violate our contract with the stockyards company for the use of this sidetrack. The stockyards company is an industry on the New York Central Railroad, just the same as any other industry is. We have a sidetrack agreement with them. There are many of those sidetrack agreements in existence, as is shown in the record, which gives the railroad company a right to reach other industries by using that private industry's track.

They can go over it, but they must not interfere with the operations of the immediate or the initial industry. They can
221 use the track to a limited extent, and they can use it to reach other industries, and when that is done, it is customary—as the sidetrack agreements which are on record show—for the cost of maintenance of the track to be reduced on behalf of the initial industry, because they are not getting the entire use of it.

All of these sidetrack arrangements are subject to change and

subject to restrictions of various kinds. Before going into that, however, I would like to clear up one thing which Mr. Rynder mentioned about the stockyards being paid money for these other tracks over in here [indicating] by the railroads. That is true, but these other tracks referred to by Mr. Rynder, for instance, these tracks in here [indicating], are what they call loading and unloading tracks for livestock, which is unloaded into the stockyards unloading pens, or which are loaded from those pens. These tracks belong to the New York Central Railroad. They are laid on property of the stockyards, and the railroad company naturally maintains those tracks. The railroad company maintains this track that has been referred to, the 1,619 feet of track owned by the stockyards. They maintain it in return for the privilege of moving these shipments—what they call dead freight; not livestock—to these other industries, and all of these other industries have understood right along that there was a limited or restricted use on the stockyards track.

222 We have sidetrack agreements with all of those industries. None of them are complaining. Swift is the only complainant here, and Swift, if you please, is the shipper and also the consignee.

Swift ships livestock, for instance—taking the example in the record—from Indianapolis. Swift takes a carload of livestock that it owns there, and it consigns it to itself in Cleveland, and it directs the New York Central Railroad to take that car of livestock and move over the stockyard track—the track owned by the stockyards—over to Swift's plant. Swift directs that, knowing well that the New York Central can't move that stock over that track because the stockyards has prohibited it, and Swift knows that the stockyards wants a charge for the use of that track for livestock.

So, will the railroads be harmed here if there is any attempt made to comply with this order? How can the railroads comply with the order? Where can we give Swift & Company a track connection through the stockyards property? It is impossible for that to be done.

Something was said by Mr. Reidy about a full hearing before the Commission. We are not here complaining about a full hearing before the Commission. We are complaining about not

223 having full consideration given to the facts. We are complaining about the arbitrariness of the order, in ordering us to do the impossible thing; and of the inconsistency of the

order, in the first place: five railroads being ordered to provide a track connection, who are not able under any circumstances to do so.

Some mention was made here of the Alton Railroad case, and I would like to distinguish that, because that can easily be distinguished, as can all of the cases cited by the Interstate Commerce Commission, and the Attorney General here, and Swift & Company. There isn't any law that I know of that particularly is on all fours with the controversy before this Court. Some are close, but there are none where the industry itself is trying to say to another industry, "I have got to use your track to get out to the main line of the New York Central Railroad, because I don't want to build my own direct track connection." That is what is happening here.

In most of the other cases cited to you, with the exception, possibly, of the Sholl case—and in the Sholl case, there was a limitation upon a commodity there—the commodity was coal. There was a limitation, and the Court recognized it. The Court said the owner of the property had a right to protect itself against movements of competitive shipments of coal over that track. In the Sholl case, the railroad undertook to issue a tariff and to
224 move competitive coal over Sholl Brothers property. The Court said, "You can't do that, because you accepted the property to use it with that limitation," so that where the railroad attempted to do that, the Court said it couldn't be done.

If the railroad would attempt to do that here, the chances are that the Court would say it couldn't be done. "Where do you get your right to use stockyard property for moving this competitive or forbidden traffic?"

There has been something said here about Section 1 (9), and also about the Alton Railroad vs. Illinois Commerce Commission case. In that Alton case, there was a section of the Commerce Commission law of Illinois, which required a railroad company to do certain things in connection with putting in a side track. In that particular argument, the railroad company had agreed to be bound by the provisions of an ordinance to render service there, in that case. There was an argument between the industries and the railroad as to who was going to pay taxes and maintain the track, and the railroad went into receivership and the receiver claimed that it wasn't part of their transportation obligation. But the Court said, "You agreed in a contract to do it." So in the Alton case, it has no application, as I see it, to the argument here.

Now, under the provisions of Section 1 (9), I don't think
225 there is any great mystery about the application of Section 1 (9) by the Interstate Commerce Commission. That Commission is given broad powers, but there are good reasons why it is not given powers to appropriate property in any State. There are good reasons for that. Section 1 (9) has been discussed here under the Interstate Commerce Commission's and the Attorney General's brief, and on page 44 is cited this 275 U. S. 404 case, and in that case, although it isn't quoted, it says, "The railroad cannot be ordered to build the switch until after the shipper has built the private siding." So there is no question about that.

Also, in Luton Mining Company vs. Louisville & Nashville Railroad Company, cited at page 50 in the Commission's and Attorney General's brief, the Court held: "It is apparent from a reading of this section of the statute that no duty is imposed upon the railroad beyond its own right-of-way." Very true, that is a State court case, but there are numerous other cases like that, that hold that, and this is the first case, to my knowledge where the Commission has said that its order should be enforced, compelling the railroad to go off of its right-of-way, to go over onto the other property owner's property, and provide a connection for a shipper.

Instead of depriving Swift of anything in the use of this track
226 over here, it seems to me that the New York Central Railroad didn't deprive anyone of a public service. Rather, what we did was to begin the service for them, whatever the stockyards would permit to be moved over that track. The New York Central has taken no arbitrary action here. The New York Central took action only when the stockyards said that this business—the volume of it—was getting to be so great that "it affects our revenues, and if you move that over there, we want to be paid for it, and that charge is not in your line haul charge."

Frankly, we think the Swift request is unreasonable. We find nothing in the statute which says that an unreasonable request of a shipper must be granted. There isn't any other shipper that is asking us to go over on another property owner's property and build a track with them, and provide a connection.

Swift & Company have the advantage of Section 1 (9), just the same as the Long Dressed Beef, the Ohio Provision, and the Lake Erie Provision Company tracks are now connected to our main line, if Swift & Company would build its track up to our right-of-way line.

If any of the other three industries mentioned, which have direct track connections, should have any trouble with their service, they could enforce their rights under Section 1 (9) of the Act, because the railroad is required to render a service to operate over that connection. They have complied with the Act,
227 and they are in position to compel the railroad to perform the service and give them transportation over their tracks, because they are built up to our right-of-way.

In this case, Swift provided the right-of-way down here and they provided it because they didn't want to go up to the north end of West 63rd Street, which, by the way, doesn't show on this map, but it does show on Exhibit 13 very clearly. They didn't want to go up there and spend the money to build their own track connection.

When I handed the Court this Exhibit 11, I expected to call attention to Exhibit B, which is a letter dated July 30, 1939, written by Swift & Company to the New York Central, as follows: "Replying to your letter of the 29th, our statement was that we thought the packers would contribute $5,000 toward the damages account of building the Prim Street track"—that is, in order to get the connection up there [indicating] "and that if the others would give $3,000 or more, the Peoples Packing Company would give enough to make up the $5,000, but not to exceed $2,000." Swift was not willing to give more than $2,000 to get in a permanent track connection. The letter says, "but not to exceed $2,000 in any case, provided the track was built without further delay and without waiting for the lawsuits to be settled. This confirms what I have told you before, and please say if it is
228 satisfactory and if you will proceed on these lines."

Judge ALLEN. Your time is consumed, Mr. Pierce. Just state your last point, whatever it is.

Mr. PIERCE. I just want to say this, if the Court please, that the railroad is required here to do something that it cannot fulfill. The Commission doesn't tell us how it can be done. It simply says, "Go do it."

Submission of case

Judge ALLEN. The Court will take under advisement the motion to strike, which has been filed here, and the case is submitted.

229 In The District Court of The United States For The Northern District of Ohio, Eastern Division

Civil No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before ALLEN, Circuit Judge, and JONES and FREED, District Judges

Opinion

Filed March 11, 1947

JONES, District Judge.

These two cases, by stipulation of the parties and order of the Court, were consolidated for hearing and decision since they arise out of the same facts and circumstances, and in each case the same order of the Commission is challenged and sought to be enjoined. The plaintiffs in both cases were parties to the proceedings before the Commission and it was against both of them that the Commission issued its single order now under consideration.

The facts are not in dispute and are fully set forth in the Commission's opinion and in the several briefs of the parties.

For the purpose of decision the facts briefly may be summarized:

The Cleveland Union Stock Yards Company of Ohio has been engaged in the business of operating public stockyards and a public market, on its own lands, in the City of Cleveland since 1893. Since 1921 its stockyards have been posted as a stockyard under the provisions of the Packers and Stockyards Act and from then until now it has operated under the jurisdiction of the Secretary of Agriculture. It has no railroad equipment and operates no trains or cars.

230 In May 1899, the Stock Yards Company entered into agreement with The New York Central Railroad Company

(then the Big Four) to construct track 1619 (1,619 feet in length) upon lands of the Stock Yards Company to connect with a 132-foot spur from the Railroad Company's main track. The Railroad laid the track and maintained it at the Stock Yards' expense. The Railroad was given the right to use the track, without cost, for business other than that of the Stock Yards Company, provided such use did not interfere with the business of the Stock Yards Company. The agreement contained a 60-day termination clause. In June 1924, that agreement was canceled and another private sidetrack agreement was executed by the Stock Yards Company and the Railroad for operation over lands of the Stock Yards Company and over the same track 1619. A 30-day termination clause was inserted in this second agreement.

Although Swift & Company earlier and successfully had negotiated for a spur and sidetrack directly from the Railroad Company's main track to its own siding (plaintiff's exhibit 11, with map and letters attached) this opportunity of securing direct service was abandoned by Swift & Company as too expensive, and Swift & Company continued to be served by the Railroad Company over the Stock Yards Company's private track and the Railroad's own switch track and "wye" beyond; and this with full knowledge on the part of Swift & Company of the Stock Yards' continued assertion of its complete ownership of track 1619 and the contractual reservation for the termination of its use.

In February 1935, another contract superseded the agreement of June 1924, prohibiting free use of track 1,619 for competitive traffic, construed by the Railroad and Stock Yards to mean livestock shipments, a charge for which was to be the subject of separate agreement. No agreement as to the charge for such shipments being reached between the Railroad Company and the Stock Yards Company, on November 12, 1938, the Railroad's switching charge was made inapplicable to livestock. For some time prior to that date, and ever since, the Railroad has refused to deliver any livestock shipments to Swift & Company's private siding over Stock Yards' track 1619. After an ineffectual exchange of letters between the Railroad and Swift & Company the latter, on September 5, 1941, filed its complaint with the Commission.

231 We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction. In this case we consider only the legality of its order upon the record. The Railroad complains that the Commission's order requires it to do an unlawful act and that it cannot comply with the order because it is without control over the Stock Yards' property and track 1619; that the contract for the use of the track excludes the transportation of shipments of live-

stock to Swift & Company and that it, the Railroad, is without the means of accomplishing what the Commission orders. The Stock Yards Company asserts that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law.

There are various other allegations in the complaints urged by both plaintiffs to support their contentions that the Commission's order legally cannot stand.

We address ourselves to what we conceive to be the principal and fatal flaw in the Commission's order. We assume, without deciding, that under the Elkins Act the Commission has jurisdiction over the Stock Yards Company when made a party as in this case and has the power to enter a lawful order affecting the Stock Yards in respect of matters in which the Commission has authority.

Upon the hearing of the petition of Swift & Company seeking to require the Railroad to deliver, and the Stock Yards to permit delivery of, its shipments of livestock to its plant over track 1619, the Commission ordered these two complainants to do so, notwithstanding the fact that track 1619 is owned by the Stock Yards Company and is wholly upon its private property. The only reason for thus subjecting the private property of the Stock Yards Company to the use of Swift & Company appears to be a finding that track 1619 for a number of years has been devoted to public use.

We think the finding does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable
232 upon 30- and 60-day notices, respectively. Certainly, upon these facts and upon the record there has been no such devotion of track 1619 to public use as to amount to a dedication of the Stock Yards' property as a public highway or as a part of the Railroad Company's system over which the latter lawfully may move shipments of freight or livestock to the Swift & Company plant.

Both Swift & Company and the Commission rely heavily upon Morgan Run Rwy. v. Public Utilities Commission, 98 O. S. 218; 120 N. E. 295, and Alton RR Co. v. Illinois Commission, 305 U. S. 543, 555. It is our opinion that neither of these cases furnish support for the order. The former we think not pertinent since it arises out of and depends upon the construction of State statutes.

Also, in that case there were the following facts which undoubtedly influenced decision: It was conceded that the controlling interest in the railway company and the coal company was owned by substantially the same persons, although in different proportions, and that the same person was president of both companies. In the latter case the owner of the land over which the shipments were required to be made apparently was not a party, nor did the owner present any objection to the use of the private property. This latter decision also was based upon the effect of a State statute. On page 555 of Alton RR Co. v. Illinois Commission, supra, the opinion makes it clear that the situation here readily may be distinguished. Contrary to the appellant in that case, the Railroad here is asserting that it would be a trespasser and without right to continue to use the track as required by the order. At the conclusion of the second paragraph on page 555, the Court cites Roberts v. Northern Pacific R. Co., 158 U. S. 1, at page 11; and Northern Pacific R. Co. v. Smith, 171 U. S. 260, at page 271. In these cases the land owner made no effort to assert ownership, nor did the owner make any objection or take any steps to establish private property rights until long after trespass had been accomplished.

Here, the Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.

233 Although the Commission holds that track 1619 is now and for some years has been devoted to the public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of track 1619 has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company openly to assert its complete ownership and restrict its use.

It was urged in argument before us by counsel for the Commission that such use of the track of the Stock Yards Company has made it a part of the New York Central Railroad system; and that the Railroad cannot refuse to continue to serve Swift & Company or others over that track since the Railroad acted unlawfully in

contracting for its use. If the Railroad was out of bounds in entering into a contract with the Stock Yards Company which permitted withdrawal of service to Swift & Company, its wrongful conduct, if such it was, cannot be rectified by penalizing the Stock Yards Company and by taking part of its property. If the Commission lawfully may compel the Railroad Company to use track 1619 as its own or as one which it controls it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess. The order effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company without due process of law.

We think that jurisdiction of the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property. The Commission cannot, as we think, lawfully order the Railroad to do what by law is forbidden by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system. Such transfer of property lawfully cannot be made short of condemnation and compensation.

The constant, consistent, and notorious control reserved by contracts between the Railroad and the Stock Yards Company
234 is sufficient bar to any legal finding that track 1619 had been devoted to the public use in the sense that the Stock Yards Company has surrendered some portion of its title or that the track thereby has become a public highway or common carrier.

To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

In the view we take of the case, the complainants each are entitled to the relief prayed for.

Treating the proceedings as one upon final hearing, enforcement of the order of the Commission will be permanently enjoined.

Findings and conclusions may be presented for adoption and a decree entered accordingly.

[File endorsement omitted.]

235 In the District Court of the United States

[Title omitted.]

Civil No. 24435

Civil No. 24479

Plaintiffs' suggested findings of fact and conclusions of law

Lodged March 31, 1947

These two cases, in which the same facts and circumstances are involved and the same Order of the Commission is challenged and sought to be enjoined in each case, were consolidated by stipulation and order of the court and came on for hearing the 25th day of February 1947, upon the complaints of the plaintiffs, answers, briefs, arguments, and certified record and evidence of all proceedings before the Interstate Commerce Commission, in its Docket No. 28714, entitled Swift and Company vs. The Baltimore & Ohio Railroad Company, Erie Railroad Company (Robert E. Woodruff and John A. Hadden, Trustees), The New York Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company and the Wheeling & Lake Erie Railway Company, The Cleveland Union Stock Yards Company and the Livestock Terminal Service Company.

Upon due consideration, the court adopts the Findings of Fact and Conclusions of Law hereinafter set forth:

FINDINGS OF FACT

The facts are not in dispute and may be summarized as follows:

236 I

The railroad and property of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company have, since 1930, been leased to and operated by The New York Central Railroad Company (hereinafter referred to as "New York Central"). The main line tracks of said railroad in the city of Cleveland extend in a general easterly and westerly direction, in the vicinity of West 65th

Street. The Cleveland Union Stock Yards Company (hereinafter referred to as "Stock Yards") owns and operates stock yards which are located adjacent to and south of said New York Central main tracks and right-of-way and bordering the westerly side of West 65th Street. The Stock Yards owns certain private sidetracks located on its own land, among which is a private sidetrack, 1,619 feet in length, which extends in a general northerly and southerly direction parallelling, and in close proximity to, the westerly line of West 65th Street. This 1,619 feet of track connects at its northerly end with the initial turn-out or lead (139 feet long) from New York Central main tracks located on New York Central right-of-way, and forms the connecting track between the northerly and southerly portions of what is called track No. 245. The southerly end of said 1,619 feet of track connects with a track 793 feet long, which extends southerly and is owned by New York Central and located upon lands owned by Stock Yards, or which lands were reserved for sidetrack purposes by Stock Yards. This 793 feet of track, together with a switch track, known as No. 240 (Exhibit "C"), which diverges from the southerly portion of said hereinbefore described
237 track No. 245, were built in 1910 at the request of and pursuant to arrangements made by Swift and Company (Exhibit No. 11) and track No. 240 was extended in an easterly direction across West 65th Street and thence northeasterly along the West 63rd Street side of Swift and Company's plant to enable delivery of shipments to Swift and Company's meat processing plant at that point.

II

The Cleveland Union Stock Yards Company of Cleveland, one of the plaintiffs herein, is a noncarrier corporation, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, and, since 1893, has been engaged in the business of operating public stockyards and a public market on its own lands in the City of Cleveland. Since 1921, its stockyards have been posted as a stockyard in accordance with the provisions of the Packers and Stockyards Act, subject to the jurisdiction of the Secretary of Agriculture of the United States.

The Cleveland Union Stock Yards Company does not own, control, or lease any rolling stock, locomotives, or railroad cars of any kind. It operates no railroad. It owns no railroad tracks, other than private switch tracks located on its own land. One of these private switch tracks, designated in these proceedings as track 1619, and mentioned hereinbefore, is involved in this controversy. Carload shipments of all commodities consigned to or from Swift and Company's meat processing plant private side-

track and the sidetracks of other packers and industries in that particular area must traverse this 1,619 feet of track and lands owned by Stock Yards in order for the New York Central to serve such plants wtih respect to carload shipments.

238 III

In May 1899, The Cleveland Union Stock Yards Company entered into an agreement with the lessor (The Cleveland, Cincinnati, Chicago & St. Louis Railway Company), of New York Central to construct certain private sidetracks upon the lands of the Stock Yards, including the 1,619 feet of track here in question. The railroad laid the track and maintained it at Stock Yards' expense. The railroad was given the right to use the track without cost for business other than that of the Stock Yards Company. The agreement contained a 60-day termination clause.

On June 16, 1924, the agreement of May 1899 was cancelled and another private sidetrack agreement was executed by the Stock Yards Company and the lessor of New York Central, providing for the use and maintenance of the same 1,619 feet of track and other tracks. This agreement contained a 30-day termination clause. The agreement of June 16, 1924, was superseded by an agreement, effective February 1, 1935, which prohibited the use of said 1,619 feet of track for competitive traffic, construed by the railroads and the Stock Yards Company to mean carload shipments of livestock, a charge for which was to be the subject of a separate agreement. The New York Central and the Stock Yards could not reach an agreement as to charges for the use of said 1,619 feet of track for movement thereover of carload shipments of livestock and on November 12, 1938, the switching charge theretofore published in tariffs of plaintiff railroads was made inapplicable to livestock consigned to or shipped from any industry reached by using said 1,619 feet of track. For some time prior to that date and ever since, plaintiff railroads have refused to deliver any carload shipments of livestock to Swift and Company's private sidetrack or any other industry reached by using Stock Yards' 1,619 feet of track.

239 IV

In a letter, dated August 14, 1941, Swift and Company notified the plaintiff railroads that all shipments of livestock would thereafter be billed for delivery at Swift and Company's plant in Cleveland, and requested that such delivery be made. After an ineffectual exchange of letters between the railroads and Swift and Company, the latter, an Illinois Corporation, having a branch packing plant in Cleveland, Ohio, on September 5, 1941,

filed with the Interstate Commerce Commission a complaint against the railroad companies hereinbefore named, the Cleveland Union Stock Yards Company and The Livestock Terminal Service Company (the latter-named company was a subsidiary of the Stock Yards Company and in the interim has been dissolved).

The Cleveland Union Stock Yards Company was named as a defendant in said complaint upon the theory that it was a proper party under the Elkins Act (Sec. 42, Title 49, U. S. C.) and subject to the order of the Interstate Commerce Commission. Said complaint alleged, among other things, that Swift and Company is deprived of lawful transportation to which it is entitled in violation of Section 1 (3) of the Interstate Commerce Act, that the railroads had abandoned the operation of a portion of their line of railroad necessary to the Swift and Company's plant in Cleveland, without prior authority therefor, in violation of Sections 1 (18), 1 (19) and 1 (20) of said Act; that Swift and Company is subjected to unjust discrimination by reason of said railroads denying to Swift and Company services which were rendered to three competitors of Swift and Company, in violation of Section 2, and Swift and Company and its traffic had been
240 subjected to undue and unreasonable prejudice and disadvantage, in violation of Section 3 (1) of said Act. In said complaint, Swift and Company sought the reestablishment of tariff provisions and other relief which would result in transportation to its plant in Cleveland of carload shipments of livestock at rates not in excess of the line haul rates of said railroads. The Cleveland Union Stock Yards Company was alleged to be partly responsible for the alleged violations of the Interstate Commerce Act in that it refused to permit the delivery of livestock over its 1619 feet of track.

V

After full hearing, the Interstate Commerce Commission, on May 3, 1946, found in favor of Swift and Company, against all the defendants in the proceedings before it, and at the same time issued the following order:

"ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of May A. D. 1946

No. 28714

SWIFT AND COMPANY

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY (ROBERT E. WOODRUFF AND JOHN A. HADDEN, TRUSTEES), THE NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, THE CLEVELAND UNION STOCK YARDS COMPANY, AND LIVESTOCK TERMINAL SERVICE COMPANY

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and having found that the present practice of defendants in refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried
241 over their lines and consigned thereto is in violation of section 3 (1), section 1 (6) and section 1 (9) of Part I of the Interstate Commerce Act, and having made the other findings required by said paragraph:

It is ordered, that the above-named defendants, or either of them, be, and they are hereby notified and required to cease and desist, on or before the 30th day of August 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

It is further ordered, that said defendants, or either of them, be, and they are hereby notified and required to establish and put in force, on or before the 30th day of August 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipments of livestock carried over defendants' lines and consigned thereto.

And it is further ordered, that this order shall remain in full force and effect until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

By request, the effective date of the foregoing order was postponed from time to time, and finally to the ------ day of June 1947.

VI

The record before the Commission shows conclusively that Swift and Company at all times had full knowledge of the Stock Yards continued assertion of its complete ownership, and reservation of control of use, of track 1619 and the fact that the Stock Yards reserved the right by agreement to terminate the use of said track.

Swift and Company earlier and successfully had negoti-
242 ated for its own private sidetrack to be connected directly with the New York Central's main track and right of way at the north end of West 63rd Street (Plaintiff's Exhibit 11, with map and letters attached), but this opportunity of securing service by means of a direct connection to the railroad company's main track was abandoned by Swift and Company as too expensive and Swift and Company then (in 1910) sought and obtained switching service to its private sidetrack, by the use of Stock Yards' 1,619 feet of track, the construction of an extension of 793 feet of track to the southerly end of said Stock Yards track (being a part of track known as No. 245), and a wye track in connection therewith and extending said wye track across West 65th Street, in order to move cars thereover to Swift and Company's private sidetrack.

VII

At all times, Stock Yards consistently, constantly, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Swift and Company and six or seven other packing plants are served by the New York Central traversing Stock Yards' 1,619 feet of track with the consent of the Stock Yards for delivery of all classes of freight except livestock. Every shipper serving or being served by the use of said 1,619 feet of track has had full knowledge of Stock Yards' said ownership and control of said track. No one has been led to act to his harm by any sufferance or acquiescence by the Stock Yards in the use permitted of its track or by any failure upon the part of Stock Yards more openly to assert its complete
ownership or to restrict its use. There is no evidence
243 that Stock Yards has ever acquiesced in any use of its land or said track by the Railroad or Swift and Company, except under the provisions of the side track agreement. The entrance upon the land of the Stock Yards and the use of its track were not by sufferance, but, from beginning to the end, under the

provisions of a written contract, expressly asserting ownership and reserving therein the property right of Stock Yards, limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively, all of which were well understood by Swift and Company, as well as by the Railroad.

In view of the foregoing facts, we think the findings of the Commission with respect to Stock Yards' 1,619 feet of track for a number of years having been devoted to a public use is without legal support in the record. Certainly, upon these facts and upon the record, there has been no such devotion of said 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company system over which the latter may lawfully move shipments of freight or livestock to the Swift and Company plant without permission of the owner.

VIII

The record is clear, and the Commission finds, that each of Swift and Company's three named competitors, i. e., the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, have constructed their own individual private sidetracks to connect directly with the main line railroad and right-of-way of the New York Central, and delivery to
244 each of said three named competitors is rendered without using any track belonging to Stock Yards. The physical conditions existing with respect to reaching these three plants are therefore definitely different from the conditions attendant upon reaching Swift and Company's plant.

IX

Railroad plaintiffs urge the point that the Commission's order would require the railroads to disregard the practices and rules promulgated by the Commission in connection with Ex Parte 104, part II, Terminal Services, with respect to placing and spotting of cars on side tracks or private industries. In view of our findings with respect to the lack of legal support for other parts of the Commission's order we make no finding with respect to this phase.

245 *Conclusions of law*

I

The Interstate Commerce Commission transcended its constitutional and statutory powers when, in its order, it effectually sub-

ordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company, without due process of law. If the Commission lawfully may compel the New York Central to use Stock Yards' 1,619 feet of track as the railroad's own track, or as one which it controls, it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess.

II

The Interstate Commerce Commission cannot lawfully order the railroads to do what by law is forbidden, by declaring that the track of The Cleveland Union Stock Yards Company under the circumstances is a part of the New York Central system. Such transfer of property lawfully cannot be made short of condemnation and compensation. These questions are left to the Courts and not to the Interstate Commerce Commission.

III

Jurisdiction over The Cleveland Union Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Interstate
246 Commerce Commission to order The Cleveland Union Stock Yards Company to desist from the practice of asserting or exercising complete ownership of and control over its property.

IV

The Cleveland Union Stock Yards Company is not subject to regulation by the Interstate Commerce Commission under Section 1 of the Interstate Commerce Act. Because of other legal questions in this case, the Court does not consider it necessary to determine whether the Interstate Commerce Commission has jurisdiction over The Cleveland Union Stock Yards Company under the Elkins Act (Section 42, Title 49, U. S. C.).

V

The Cleveland Union Stock Yards Company is a noncarrier corporation organized under the laws of the State of Ohio in 1893, and it is engaged in a general stockyard business at Cleveland, Ohio. It is posted as a stock yard in accordance with the provisions of the Packers and Stockyards Act and it is thereby subjected to the jurisdiction of the Secretary of Agriculture of the United States.

VI

Whatever may be the legal status of the contract between the Railroad Company and The Cleveland Union Stock Yards Company, restricting the use of said 1,619 feet of track against delivery of livestock to the plant of Swift & Company, the Interstate Commerce Commission cannot lawfully rectify such contract by penalizing The Cleveland Union Stock Yards Company and taking part of its property.

247

VII

The Cleveland Union Stock Yards Company has never at any time dedicated said 1,619 feet of track to public use as a public highway or a part of the railroad system. It has constantly, by virtue of sidetrack agreements or contracts, asserted ownership and reserved property rights therein.

VIII

The Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift and Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufference but under the terms of a written contract, the provisions of which were well understood by Swift and Company as well as by the Railroad.

Although the Commission holds that said 1,619 feet of track is now and for some years has been devoted to public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of said 1,619 feet of track has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company more openly to assert its complete ownership and restrict its use.

IX

The constant, consistent, and notorious control reserved
248 in written contracts between the railroad and Stock Yards is a sufficient bar to any legal finding that said Stock Yards' 1,619 feet of track had been devoted to the public use, in the sense that the Stock Yards has surrendered some portion of its title or that the track thereby has become a public highway or com-

mon carrier. There has not been any such devotion of Stock Yards' 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company's system under the provisions of Section 1 (3) (a) of the Act, over which track the railroad lawfully may move shipments of freight or livestock to the Swift and Company plant.

X

The Interstate Commerce Commission erred as a matter of law in ordering The Cleveland Union Stock Yards to devote the use of its said 1,619 feet of track and the property underlying the same for delivery of livestock to Swift and Company.

XI

To require the service sought by Swift and Company, not only would amount to appropriation of the property of The Cleveland Union Stock Yards Company for the use of Swift and Company, but would in effect prefer Swift and Company over others who built and own their own connecting switches or sidetracks.

XII

In view of the undisputed disparity existing between the
249 direct private sidetrack connections of Swift and Company's three named competitors and Swift and Company's own indirect private side track connection the Commission exceeded its powers and authority in undertaking to invoke in Swift and Company's behalf the powers of the Commission under the provision of Section 1 (9) of the Act.

Notwithstanding the similarity of active competition and other phases of the same general business in which Swift and Company and its three competitors are engaged, the pronounced dissimilarity in track connections mentioned above and the failure of Swift and Company to bring itself within the purview of Section 1 (9), with respect to its own track connections, removes every semblance of a basis for holding that there is any discrimination whatsoever against Swift and Company, or any undue and unreasonable prejudice and disadvantage to Swift and Company in violation of Section 3 (1) of the Act with respect to delivery of carload shipments of livestock.

XIII

In view of the full knowledge by the complaining shipper of limitations placed upon the railroad's use of another private side-

track, no legal basis exists for a finding of any violation of Section 1 (6) of the Act, nor can there be any harm to such a shipper under such circumstances with respect to contrary provisions in a tariff.

XIV

No provision is found in the term "railroad" contained in Section 1 (3) (a) of the Act to the effect that private property used by a carrier under contract for limited purposes thereby becomes a railroad for unlimited use. With the long history of the limited use permitted and made of Stock Yards' 1,619 feet of track
250 and the full knowledge by the complaining shipper of such limited use, there is not any basis in law for a finding that the use of that track for said limited purposes constitutes it a part of the railroad system for the benefit of the shipper under the provisions of Section 1 (3) (a).

XV

Where, as in this case, the record before the Commission shows that a shipper had the opportunity of constructing its own private sidetrack to connect directly with the main line railroad and right of way of the Railroad and such arrangement was available and could be operated with safety and the shipper discards that arrangement and chooses to obtain service to its private track by the use of another privately owned track, the ownership and control of which was notorious and apparent at all times, there is no legal support for a finding to the effect that said complaining shipper is entitled to continuous service to its plant, nor is there any legal basis for a finding of a violation of Section 1 (9) of the Act. There is no legal support for the authority or power of the Commission to require railroads to render service in making direct delivery to the private sidetrack of a shipper where there is a legal or physical obstacle preventing such service and where the complaining shipper is, as in this case, well aware of the permissive use only of an intervening private track granted by its owner to the railroads. The fact that the railroads may have gained some benefit for a shipper in obtaining limited use of a privately owned track for a period of time cannot be found to have ripened into a right to require the railroad to provide the use of said intervening privately owned track for further benefit of the shipper.

251

XVI

A railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in

fact available for use. Common carrier services over private sidings and private industrial tracks cannot be expected, and certainly cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevent it from entering upon those tracks, nor is it within the jurisdiction of the Commission to order a carrier, or any other party, to take steps to remove such obstructions.

XVII

The complainants herein are entitled to the relief prayed for; the Report and Order of the Commission are beyond the lawful authority of the Commission and wholly illegal and void; said Order is hereby vacated and set aside and the enforcement thereof perpetually restrained and enjoined; The Cleveland Union Stock Yards Company is hereby declared to have the legal right to restrict the use of its industrial sidetrack for the protection of its business; it had, and has, the right to collect such compensation as it deems proper; it had and has the lawful right to cancel its sidetrack agreement with The New York Central Railroad Company and it had and has the legal right to withdraw entirely the use of its sidetrack for the benefit of Swift and Company and other packers and shippers located upon it.

It is so ordered, and counsel for plaintiffs will submit appropriate judgment in accordance herewith.

252 The foregoing findings of fact and conclusions of law are respectfully submitted.

The Baltimore and Ohio Railroad Company, by Dwight B. Buss; The Pennsylvania Railroad Company, by Geo. H. P. Lacey; The Erie Railroad Company, by Willis T. Pierson; The Wheeling and Lake Erie Railroad Company, by John A. Duncan, Perry L. Graham; The New York Central Railroad Company, by Leo P. Day, Robert R. Pierce; The Cleveland Union Stock Yards Company, by M. S. Farmer.

A copy of the above Findings of Fact and Conclusions of Law were this 31st day of March 1947, sent by U. S. Mail to the Attorney General of the United States of America, the Interstate Commerce Commission, the United States District Attorney, and Swift and Company.

ROBERT R. PIERCE,
U. S. Dist. Judge.

254 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Findings of fact, conclusions of law and decree suggested by defendants lodged April 14, 1947

The Court adopts the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Cleveland Union Stock Yards Company of Ohio has been engaged in the business of operating public stockyards and a public market, on its own lands, in the City of Cleveland since 1893. Since 1921 its stockyards have been posted as a stockyard under the provisions of the Packers and Stockyards Act and from then until now it has operated under the jurisdiction of the Secretary of Agriculture. It has no railroad equipment and operates no trains or cars. (Opinion of Court, p. 2.)

255 2. In May 1899, the Stock Yards Company entered into agreement with The New York Central Railroad Company (then the Big Four) to construct track 1619 (1,619 feet in length) upon lands of the Stock Yards Company to connect with a 132-foot spur from the Railroad Company's main track. The Railroad laid the track and maintained it at the Stock Yards' expense. The Railroad was given the right to use the track, without cost, for business other than that of the Stock Yards Company, provided such use did not interfere with the business of the Stock Yards Company. The agreement contained a 60-day termination clause. In June 1924, that agreement was canceled and another private sidetrack agreement was executed by the Stock Yards Company and the Railroad providing for the use and maintenance by the railroad of the same track 1619 and other tracks. A 30-day termination clause was inserted in this second agreement. (Opinion of Court, p. 2, with slight modification.)

3. Although Swift & Company earlier and successfully had negotiated for a spur and sidetrack directly from the Railroad Company's main track to its own siding this opportunity of securing direct service was abandoned by Swift & Company as too expensive, and Swift & Company continued to be served by the Railroad Company over the Stock Yards Company's private track

and the Railroad's own switch track and "wye" beyond; and this with full knowledge on the part of Swift & Company of the Stock Yards' continued assertion of its complete ownership of track 1619 and the contractual reservation for the termination of its use. (Opinion of Court, pp. 2-3.)

4. In February 1935, another contract superseded the agreement of June 1924, prohibiting free use of track 1619 for competitive traffic, construed by the Railroad and Stock Yards
256 to mean livestock shipments, a charge for which was to be the subject of separate agreement. No agreement as to the charge for such shipments being reached between the Railroad Company and the Stock Yards Company, on November 12, 1938, the New York Central Railroad's switching charge from connecting lines was made inapplicable to livestock. For some time prior to that date, and ever since, the New York Central Railroad has refused to deliver any livestock shipments to Swift & Company's private siding over Stock Yards' track 1619. After an ineffectual exchange of letters between all the Railroads serving Cleveland and Swift & Company the latter, on September 5, 1941, filed its complaint with the Commission. (Opinion of Court, p. 3, with slight modification.)

5. From 1910 to February 1, 1935, the railroads transported all classes of freight, including livestock to and from Swift's siding over Track 1619; from January 1, 1930, to February 1, 1935, 1,161 carloads of livestock were so transported. Since February 1, 1935, they have transported all freight other than livestock to and from such siding over said tracks. The 1,619 feet of track owned by the Stock Yards Company, but maintained and operated by the railroad, is a portion of the only rail connection between seven industries and the railroads serving Cleveland. The carriers also transport carload shipments of livestock to the private sidetracks of Swift's competitors, The Lake Erie Provision Company, Long Dressed Beef Company and Ohio Provision Company whose tracks are adjacent to the stockyards but are served by the railroad without using tracks belonging to the Stock Yards. The service is performed by the carriers at the line-haul rates to Cleveland. These three plants are all located in the same general section of the New York Central's Cleveland yard as that in which Swift's plant is located. (Rept. of Interstate Commerce Commission, p. 59.)

257 6. It was necessary for Swift to take its livestock at certain hold pens in the Stock Yards short of its siding and drive its livestock across a street to its yards for slaughter. The parties were in dispute as to who should pay the charges for services performed beyond the unloading pens, assessed by the Stock Yards Company, and Swift filed the instant complaint, alleging

that the refusal of the railroads to deliver traffic at its siding, violated various sections of the act. (Rept. of I. C. C., p. 65.)

7. By this complaint, it was alleged that the refusal and failure of the railroad defendants named in the complaint to deliver interstate carload shipments of livestock to Swift's sidetrack facilities at its packing plant in Cleveland have subjected and will subject it to charges for the transportation of livestock which were, are, and will be unreasonable, unjustly discriminatory, unduly preferential of Swift's competitors at Cleveland, unduly preferential of commodities other than livestock, and unduly prejudicial to complainant. Violations of section 1 (3) a, (5), (18), (19), (20), and of section 2 (1), 3 (1), and 6 (7) of the Interstate Commerce Act were alleged. In its briefs before the Commission, Swift urged that the evidence also establishes violations of section 1 (4), (6) and (9) of Part I of the Act. (Rept. of I. C. C., pp. 55–56.)

8. Swift & Company sought the establishment of tariff provisions under which it may have transported to its plant carload shipments of livestock at rates not in excess of the railroads' line-haul rates to Cleveland, thus restoring on shipments over the lines of carriers other than the New York Central the services and deliveries which were authorized by tariffs prior to November 12, 1938, and over the New York Central the services and deliveries authorized by its present tariffs. (Rept. of I. C. C. p. 56.)

258 9. Following the filing of this complaint, full proceedings were had before the Commission, following which the Commission issued its report of May 3, 1946. (Undisputed.)

10. Following the issuance of this report of May 3, 1946, petitions for reconsideration were filed by the railroad defendants, plaintiffs here, and by the Cleveland Union Stock Yards Company, also a plaintiff, to which replies were filed by Swift & Company, all as contained in the Commission's record. These petitions for reconsideration were denied by the entire Commission on October 7, 1946, whereupon these two suits were brought.

11. The facts are not in dispute and are fully set forth in the Commission's opinion. (Court's Opinion, p. 1.)

12. In No. 24435, the plaintiffs are The Baltimore & Ohio Railroad Company, The Pennsylvania Railroad Company, Erie Railroad Company, The Wheeling and Lake Erie Railroad Company, and The New York Central Railroad Company.

The plaintiff in No. 24479 is The Cleveland Union Stock Yards Company, which was a defendant in the proceedings before the Commission and is one of the defendants against whom the Commission's order runs.

Swift & Company, the complainant before the Commission, has

intervened as a party defendant in these court proceedings under the provisions of Title 28, U. S. C. A., Sec. 45 (a). (Undisputed.)

13. Jurisdiction of this court is established by the provisions contained in 28 U. S. C. A. sections 41 (28), 43–48, and 49 U. S. C. A., Section 17 (9). (Undisputed.)

14. These two cases, by stipulation of the parties and order of the Court, were consolidated for hearing and decision since they arise out of the same facts and circumstances and in each case the same order of the Commission is challenged and sought to be enjoined. (Undisputed.)

259 15. The proceeding was orally argued before a three-judge court, convened pursuant to statute, on February 25, 1947, and has been submitted to the court on briefs and oral argument. The entire record before the Commission was introduced in court at that time. (Undisputed.)

Based upon the foregoing findings of fact, the court enters the following

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject-matter of this suit. (Undisputed.)

2. We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction. In this case we consider only the legality of its order upon the record, and will consider only the complaint of the Stock Yards Company that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law. (Court's Opinion, p. 3.)

3. There are various other allegations in the complaints urged by both plaintiffs to support their contentions that the Commission's order legally cannot stand, which we will not pass upon. (Court's Opinion, p. 4.)

4. We think the Commission's finding that track 1619 for a number of years has been devoted to public use does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively. (Court's Opinion, p. 4.)

260 5. Upon these facts and upon the record there has been no such devotion of Track 1619 to public use as to amount to a dedication of the Stock Yards' property as a public highway

or as a part of the Railroad Company's system over which the latter lawfully may move shipments of freight or livestock to the Swift & Company plant. (Court's Opinion, pp. 4–5.)

6. The Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad. (Court's Opinion, p. 6.)

7. Concerning the argument that such use of the track of the Stock Yards Company has made it a part of the New York Central Railroad system, and that the Railroad cannot refuse to continue to serve Swift & Company or others over that track since the Railroad acted unlawfully in contracting for its use, we hold that if the Railroad was out of bounds in entering into a contract with the Stock Yards Company which permitted withdrawal of service to Swift & Company, its wrongful conduct, if such it was, cannot be rectified by penalizing the Stock Yards Company and by taking part of its property. (Court's Opinion, pp. 6–7.)

8. Jurisdiction over the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property. The Commission cannot lawfully order the Railroad to do what by law is forbidden
261 by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system. To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks. (Court's Opinion, p. 7.)

9. The complainants each are entitled to the relief prayed for, and treating the proceedings as one upon final hearing, enforcement of the order of the Commission of May 3, 1946, will be permanently enjoined, and a final decree to that effect entered. (Court's Opinion, p. 8.)

_____,
United States Circuit Judge.

_____,
United States District Judge.

_____,
United States District Judge.

262 In The District Court of The United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Final Decree

Filed April —, 1947

These causes being consolidated and coming on to be heard before the undersigned, constituting a Court of three judges, convened pursuant to statute (28 U. S. C. A. 47), upon application of the plaintiffs for a final injunction enjoining enforcement and annulling an order of the Interstate Commerce Commission, and final hearing having been held, the evidence and argument of counsel received and considered, and the causes submitted for final decree, and the Court having made its findings of fact and conclusions of law; it is

Considered, ordered, adjudged, and decreed that the application of plaintiffs for an injunction restraining the
263 enforcement of and annulling the order of the Interstate Commerce Commission be and it hereby is granted, and defendants, United States of America, the Interstate Commerce Commission, and Swift & Company, their agents, marshals, police, servants, attorneys, and each of them be and they hereby are perpetually enjoined and restrained from enforcing a certain order of the Interstate Commerce Commission made and entered by said Commission in its Docket No. 28714, in a proceeding entitled Swift & Company v. Baltimore & Ohio Railroad Co., et al., 266 I. C. C. 55, dated May 3, 1946, as from time to time amended by extending the effective date of said order.

------ ------,
United States Circuit Judge.

------ ------,
United States District Judge.

------ ------,
United States District Judge.

264 INTERSTATE COMMERCE COMMISSION

Office of the Chief Counsel

WASHINGTON, D. C.

APRIL 11, 1947.

Re: The Baltimore & Ohio R. R. Co., et al. v. United States, et al., Civil No. 24435; Cleveland Union Stock Yards Co. v. U. S., et al., Civil 24479

Honorable DON C. MILLER,
United States Attorney,
Federal Bldg., Cleveland, Ohio.

DEAR MR. MILLER: I enclose herewith six copies of suggested Findings of Fact, Conclusions of Law, and Final Decree for presentation to the Court, Circuit Judge Allen and District Judges Jones and Freed. These findings and conclusions were prepared after consultation between Messrs. Rynder and Staley, Attorneys for Swift & Company, and myself, and represent our joint views. Mr. Edward J. Hickey, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C., has not had an opportunity to examine these findings, but will let you know prior to April 21, 1947, which is the time within which they have to be filed, if he has any additional suggestions.

We believe that the findings are more in conformity with the decision of the court than are the findings and conclusions submitted by counsel for plaintiffs with his letter of March 31, 1947. You will observe that at the end of each paragraph of the findings we have inserted in parentheses the basis for the statements contained therein. If the court is considering the adoption of the findings and conclusions submitted by plaintiffs, we have the following suggestions to make:

1. Page 2, Section I, the sentence commencing "the Stock Yards owns certain private sidetracks located on its own land." It is our understanding that the revised sidetrack agreement of June 16, 1924 (exhibit 9 in the Commission record) indicates that the railroad had taken over the private sidetrack in the stockyards, with the exception of track 1619. This same comment would also apply to the statement in section II, page 3, reading "it owns no railroad tracks, other than private switch tracks located on its own land."

265 2. In the second paragraph of section III, page 4, reference is made to the contract of June 16, 1924. We think there should be included substantially what we have stated above—that the railroad took over the ownership and maintenance of practically all the former private sidetracks of the stockyards and took over the maintenance of track 1619.

3. Further down in the second paragraph of section III, page 4, is a statement that "the switching charge theretofore published in tariffs of plaintiff railroads was made inapplicable to livestock," etc. The Commission found and it is a fact that the New York Central never changed its tariff providing for delivery of livestock reaching Cleveland via the New York Central.

4. In the last sentence on page 8, section VII, it is stated "there is no evidence that Stock Yards has ever acquiesced in any use of its land or said track," etc. One error is that the track was

never used by Swift & Company. Another is that since 1910 the railroad tariffs provided for delivery of all freight over track 1619, including livestock, and since 1938 the New York Central tariff has continued to authorize delivery of livestock over this track. It seems to us that the stockyards must have been upon notice concerning the provisions of these tariffs.

It seems to us that the second full paragraph, section VII, page 9, is a conclusion of law rather than a finding of fact.

5. In section VIII of the conclusions of law, page 13, reference is made to the use of the land by Swift & Company. We again call attention to the fact that Swift & Company has never used the land or track.

6. Section X, page 14, the 5th line reads "livestock to Swift and Company." If this conclusion remains in practically its present form, we think the last line should be changed to read "livestock by New York Central to Swift & Company."

We believe that Conclusions of Law XII to XVI, inclusive, suggested by plaintiffs, at any rate, be stricken. A reading of the Court's opinion shows that it disposed of the case on only one ground and did not consider other contentions; however, these conclusions XII to XVI, inclusive, purport to dispose of the case on grounds not covered in the Court's opinion.

A copy of these suggested findings, conclusions, and final decree are being transmitted to all counsel.

Very respectfully,

(S) E. M. Reidy,
E. M. Reidy,
Assistant Chief Counsel.

cc: R. D. Rynder.
Edward J. Hickey, Jr.
R. R. Pierce.
D. B. Buss.
George H. P. Lacey.
Willis T. Pierson.
John H. Duncan.
Leo P. Day.
M. S. Farmer.

266 In The District Court of The United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Memorandum of objections and exceptions to the proposed findings and conclusions of the United States of America, Interstate Commerce Commission and intervener, Swift & Company.

Filed April 30, 1947

Inasmuch as the United States District Attorney was asked to call to the attention of the Court certain observations of counsel for the defendants with respect to several phases of the Findings and Conclusions of plaintiffs, the plaintiffs herewith submit their objections and exceptions with respect to the Findings and Conclusions submitted by Defendants.

Findings of Facts offered by Defendants will be discussed seriatim.

I

Finding No. 2: Beginning in the fourth line from the end, the words "providing for the use and maintenance by the Railroad of the same track 1619 and other tracks" appear and should be deleted. Defendants' counsel have substituted this language instead of the language used by the Court on Page 2 of its
267 decision, wherein the Court said that the June 1924, side-track agreement provided "for operation over lands of the Stock Yards Company and over the same track 1619" which the Court found to be an important element in determining this case and which pronouncement of the Court should be used.

II

If Finding No. 4, page 3 of Defendants' Findings is adopted, the full paragraph without any modification of the Court's phraseology should be incorporated, and then the second paragraph on page 5 of this Court's decision, reading as follows:

"Although the Commission holds that track 1619 is now and for some years has been devoted to the public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of track 1619 has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiesence, or by any failure upon the part of the Stock Yards Company openly to assert its complete ownership and restrict its use"

should be included as the second paragraph of Finding No. 4 because said above quoted pronouncement by the Court is a pivotal finding having an important bearing upon the determination of this case.

III

(a) Finding No. 5, page 3, contains a (third) sentence reading as follows:

"The 1,619 feet of track owned by the Stock Yards Company, but maintained and operated by the railroad, is a portion of the only rail connection between seven industries and the railroads serving Cleveland"

and reference is made to page 59 of the Report of the ICC.

We have searched in vain, on page 59 and through the entire Report of the Commission, but no such phraseology is found.

268 This statement is misleading and open to misconstruction inasmuch as the other six industries referred to are not in a position similar to that of Swift and Company. None of those industries has traffic competitive with the Stock Yards; each has its own separate sidetrack agreement, and none of the industries reached over said 1,619 feet of track, excepting Swift and Company, is affected in any way by the controversy, nor are such other industries contending for any arrangement contrary to the provisions of their sidetrack agreements.

Hence, if it be deemed necessary that this sentence be adopted, we suggest that in the interest of accuracy the words "seven industries" be deleted and the words "complainant's plant" be inserted.

(b) Also, the last three lines on page 3 contain reference to Swift's so-called three-competitor companies being "located in the same general section of the New York Central's Cleveland yard as that in which Swift's plant is located." This is an erroneous statement. Said so-called competitors' plants are located in the same section of Cleveland and said three competitors have their own private sidetracks connected with the main tracks of the New York Central, but neither these industries nor Swift and Company are located in any railroad yard of the New York Central. Notwithstanding the statement made by the Commission in this respect, there is no testimony to this effect.

IV

Finding No. 6, page 4: We have searched page 65 of the Report of the ICC, referred to by counsel for defendants as the

269 basis for this finding, and elsewhere in the Commission's report and this Court's decision, but are unable to find cor-

roboration for such a finding. Finding No. 6 should, therefore, be deleted in its entirety.

V

Finding No. 10, page 5 is superfluous and has no place in the Findings of Fact or Conclusions of Law and the Court did not mention it. If Finding No. 10 is adopted then the fact should be shown that two proposed reports were made by three ICC Examiners in each of which the recommendation was made that Swift's complaint should be dismissed.

CONCLUSIONS OF LAW

I

Conclusion 2, page 6, as suggested by defendants, does not conform to the Court's decision with respect to important phases of the controversy. It places the Court in the position of considering "only the complaint of the Stock Yards Company" and omits any reference to the predicament in which the plaintiff Railroads find themselves, notwithstanding the fact that the Court's decision immediately following the word "record" in the fourth line of Conclusion 2 sets forth an important phase of the railroads' position.

If this Conclusion of Law is to be adopted by the Court we suggest that the entire first full paragraph on page 3 of the Court's decision be adopted. It reads as follows:

"We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction. In this case we consider only the legality of its order
270 upon the record. The Railroad complains that the Commission's order requires it to do an unlawful act and that it cannot comply with the order because it is without control over the Stock Yards' property and track 1619; that the contract for the use of the track excludes the transportation of shipments of livestock to Swift & Company and that it, the Railroad, is without the means of accomplishing what the Commission orders. The Stock Yards Company asserts that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law" for the reason that the full consideration given by the Court to these phases is necessary in order to show the basis of the Court's decision and would be exceedingly important for a complete understanding.

II

Conclusion 3, page 6: The last six words of this paragraph "which we will not pass upon" are not stated at any point in the Court's decision. If this Conclusion of Law is to be adopted, then the six words should be deleted.

III

If conclusion 4, page 6, is to be adopted, we suggest that in order to embrace the full decision of the Court, there should be included as the first paragraph of Conclusion 4 the observations made by the Court in the next to the last paragraph on page 3 reading as follows: "We address ourselves to what we conceive to be the principal and fatal flaw in the Commission's order." And also, certainly there should be inserted the next paragraph in the decision of the Court, beginning on page 3, reading as follows:

271 "Upon the hearing of the petition of Swift & Company seeking to require the Railroad to deliver, and the Stock Yards to permit delivery of, its shipments of livestock to its plant over track 1619, the Commission ordered these two complainants to do so, notwithstanding the fact that track 1619 is owned by the Stock Yards Company and is wholly upon its private property. The only reason for thus subjecting the private property of the Stock Yards Company to the use of Swift & Company appears to be a finding that track 1619 for a number of years has been devoted to public use."

IV

Conclusion 5, page 7: Plaintiffs concede that this is a correct conclusion and should be adopted; however, this conclusion would be incomplete without adding the highly significant and essential element in the Court's decision appearing in the last full paragraph on page 6, reading as follows:

"The constant, consistent, and notorious control reserved by contracts between the Railroad and the Stock Yards Company is sufficient bar to any legal finding that track 1619 had been devoted to the public use in the sense that the Stock Yards Company has surrendered some portion of its title or that the track thereby has become a public highway or common carrier."

This conclusion is exceedingly important to the determination made by the Court and goes to the very fundamentals of the controversy. Counsel for defendants have failed to make any reference whatsoever to this profound conclusion of the Court.

V

If conclusion 7, page 7 is to be adopted we suggest that in order to show the full decision of the Court with respect to this phase the defendants' suggested conclusion should continue with the remaining two sentences in the same paragraph on page 6 of the Court's decision from which defendants'
272 *Conclusions of Law* have been extracted, said sentences reading as follows:

"If the Commission lawfully may compel the Railroad Company to use track 1619 as its own or as one which it controls it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess. The order effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company without due process of law."

VI

If conclusion 8, pages 7 and 8, is to be adopted, there should be added immediately after the sentence ending with the word "System," in the third line from top of page 8, the following: "Such transfer of property lawfully can not be made short of condemnation and compensation," which pronouncement of the Court appears immediately following the word "System" in the eighth line of first full paragraph in page 6 of the Court's decision.

Counsel for defendants have omitted any reference whatsoever to this essential element in the Court's decision.

Respectfully submitted.

Dwight B. Buss,
DWIGHT B. BUSS,
Andrew P. Martin,
ANDREW P. MARTIN,
Geo. H. P. Lacey,
GEO. H. P. LACEY,
Willis T. Pierson,
WILLIS T. PIERSON,
Perry L. Graham,
PERRY L. GRAHAM,
John A. Duncan,
JOHN A. DUNCAN,
Robert R. Pierce,
ROBERT R. PIERCE,
Leo. P. Day,
LEO P. DAY,
M. S. Farmer,
M. S. FARMER,
Attorneys for Plaintiffs.

A copy of the above Objections and Exceptions were this 30th day of April 1947, sent by U. S. Mail to the Attorney General of the United States of America, the Interstate Commerce Commission, the United States District Attorney, and Swift and Company.

Robert R. Pierce.
ROBERT R. PIERCE.

273 ORDER AND JUDGMENT

These two causes having been duly and properly submitted to this legally convened statutory three-judge court upon plaintiffs' motion for a preliminary injunction and complaint praying for a temporary and permanent injunction of enforcement of and to vacate, set aside, suspend, and annul the order of the Interstate Commerce Commission, entered May 3, 1946, in the proceeding entitled Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., Docket No. 28714, and Answers of the defendants herein, United States of America and the Interstate Commerce Commission, and intervener Swift and Company, praying that the within complaint be dismissed, and the cause having been taken under advisement by the court, and now the court being fully advised in the premises and having filed and entered of record its opinion, findings of fact, and formal conclusions of law, separately stated,

It is ordered, adjudged and decreed, that a permanent injunction be and hereby is granted, permanently enjoining the enforcement of said Order of the Interstate Commerce Commission hereinabove described and that said order be and hereby is vacated, set aside and annulled.

_____,
United States Circuit Judge.

_____,
United States District Judge.

_____,
United States District Judge.

274 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Titles omitted.]

Findings of fact and conclusions of law

Filed May 9, 1947

These two cases, in which the same facts and circumstances are involved and the same Order of the Commission is challenged and

sought to be enjoined in each case were consolidated by stipulation and order of the court and came on for hearing the 25th day of February 1947, upon the complaints of the plaintiffs, answers, briefs, arguments, and certified record and evidence of all proceedings before the Interstate Commerce Commission in its Docket No. 28714, entitled Swift & Company vs., The Baltimore & Ohio Railroad Company, Erie Railroad Company (Robert E. Woodruff and John A. Hadden, Trustees), The New York Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company and the Wheeling & Lake Erie Railway Company, The Cleveland Union Stock Yards Company, and the Livestock Terminal Service Company.

Upon due consideration, the court adopts the Findings
275 of Fact and Conclusions of Law hereinafter set forth:

FINDINGS OF FACT

The facts are not in dispute and may be summarized as follows:

I

The railroad and property of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company have, since 1930, been leased to and operated by The New York Central Railroad Company (hereinafter referred to as "New York Central"). The main line tracks of said railroad in the City of Cleveland extend in a general easterly and westerly direction, in the vicinity of West 65th Street. The Cleveland Union Stock Yards Company (hereinafter referred to as "Stock Yards") owns and operates stock yards which are located adjacent to and south of said New York Central main tracks and right-of-way and bordering the westerly side of West 65th Street. The Stock Yards owns certain private side tracks located on its own land, among which is a private side track, 1,619 feet in length, which extends in a general northerly and southerly direction paralleling, and in close proximity to, the westerly line of West 65th Street. This 1,619 feet of track connects at its northerly end with the initial turn-out or lead (132 feet long) from New York Central main tracks located on New York Central right-of-way, and forms the connecting track between the northerly and southerly portions of what is called track No. 245. The southerly end of said 1,619 feet of track connects with a track 793 feet long, which extends southerly and is owned by New York Central and located upon lands owned by Stock Yards, or which lands were reserved for side track purposes by Stock Yards. This 793 feet of track, together with a switch track, known as No. 240 (Exhibit "C"), which diverges from the southerly portion of said hereinbefore described track No. 245, were built in 1910 at the

request of and pursuant to arrangements made by Swift & Company (Exhibit No. 11) and track No. 240 was extended in an easterly direction across West 65th Street and thence northeasterly along the West 63rd Street side of Swift and Company's plant to enable delivery of shipments to Swift & Company's
276 meat processing plant at that point.

II

The Cleveland Union Stock Yards Company of Cleveland, one of the plaintiffs herein, is a noncarrier corporation, organized, existing, and doing business under and by virtue of the laws of the State of Ohio, and, since 1893, has been engaged in the business of operating public stockyards and a public market on its own lands in the City of Cleveland. Since 1921, its stockyards have been posted as a stockyard in accordance with the provisions of the Packers and Stockyards Act, subject to the jurisdiction of the Secretary of Agriculture of the United States.

The Cleveland Union Stock Yards Company does not own, control, or lease any rolling stock, locomotives, or railroad cars of any kind. It operates no railroad. It owns no railroad tracks, other than private switch tracks located on its own land. One of these private switch tracks, designated in these proceedings as track 1619, and mentioned hereinbefore, is involved in this controversy. Carload shipments of all commodities consigned to or from Swift & Company's meat processing plant private sidetrack and the sidetracks of other packers and industries in that particular area must traverse this 1,619 feet of track and lands owned by Stock Yards in order for the New York Central to serve such plants with respect to carload shipments.

III

In May 1899, The Cleveland Union Stock Yards Company entered into an agreement with the lessor (The Cleveland, Cincinnati, Chicago & St. Louis Railway Company), of New York Central to construct certain private sidetracks upon the lands of the Stock Yards, including the 1,619 feet of track here in question. The railroad laid the track and maintained it at Stock Yards' expense. The railroad was given the right to use the track without cost for business other than that of the Stock Yards Company. The agreement contained a 60-day termination clause.

On June 16, 1924, the agreement of May 1899, was cancelled and another private sidetrack agreement was executed by
277 the Stock Yards Company and the lessor of New York Central, providing for the use and maintenance of the same

1,619 feet of track and other tracks. This agreement contained a 30-day termination clause. The agreement of June 16, 1924, was superseded by an agreement, effective February 1, 1935, which prohibited the use of said 1,619 feet of track for competitive traffic, construed by the railroads and the Stock Yards Company to mean carload shipments of livestock, a charge for which was to be the subject of a separate agreement. The New York Central and the Stock Yards could not reach an agreement as to charges for the use of said 1,619 feet of track for movement thereover of carload shipments of livestock and on November 12, 1938, the switching charge theretofore published in tariffs of plaintiff railroads for that reason became inapplicable to livestock consigned to or shipped from any industry reached by using said 1,619 feet of track. For some time prior to that date and ever since, plaintiff railroads have refused to deliver any carload shipments of livestock to Swift & Company's private sidetrack or any other industry reached by using Stock Yards' 1,619 feet of track.

IV

In a letter, dated August 14, 1941, Swift & Company notified the plaintiff railroads that all shipments of livestock would thereafter be billed for delivery at Swift & Company's plant in Cleveland, and requested that such delivery be made. After an ineffectual exchange of letters between the railroads and Swift & Company, the latter, an Illinois corporation, having a branch packing plant in Cleveland, Ohio, on September 5, 1941, filed with the Interstate Commerce Commission a complaint against the railroad companies hereinbefore named, the Cleveland Union Stock Yards Company and The Livestock Terminal Service Company (the latter-named company was a subsidiary of the Stock Yards Company and in the interim has been dissolved).

The Cleveland Union Stock Yards Company was named as a defendant in said complaint upon the theory that it was a proper party under the Elkins Act (Section 42, Title 49, U. S. C.)
278 and subject to the order of the Interstate Commerce Commission. Said complaint alleged, among other things, that Swift & Company is deprived of lawful transportation to which it is entitled in violations of Section 1 (3) of the Interstate Commerce Act, that the railroads had abandoned the operation of a portion of their line of railroad necessary to the Swift & Company's plant in Cleveland, without prior authority therefor, in violation of Sections 1 (18), 1 (19), and 1 (20) of said Act; that Swift & Company is subjected to unjust discrimination by reason of said railroads denying to Swift & Company services which were ren-

dered to three competitors of Swift & Company, in violation of Section 2, and Swift & Company and its traffic had been subjected to undue and unreasonable prejudice and disadvantage, in violation of Section 3 (1) of said Act. In said complaint, Swift & Company sought the reestablishment of tariff provisions and other relief which would result in transportation to its plant in Cleveland of carload shipments of livestock at rates not in excess of the line-haul rates of said railroads. The Cleveland Union Stock Yards Company was alleged to be partly responsible for the alleged violations of the Interstate Commerce Act in that it refused to permit the delivery of livestock over its 1,619 feet of track.

V

After full hearing, the Interstate Commerce Commission, on March 3, 1946, found in favor of Swift & Company, against all the defendants in the proceedings before it, and at the same time issued the following order:

"ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of May, A. D. 1946

No. 28714

SWIFT AND COMPANY

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY (ROBERT E. WOODRUFF AND JOHN A. HADDEN, TRUSTEES), THE NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, THE CLEVELAND UNION STOCK YARDS COMPANY, AND LIVESTOCK TERMINAL SERVICE COMPANY

This proceeding being at issue upon complaint and
279 answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and having found that the present practice of defendants in refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried over their lines and consigned thereto is in violation of section 3 (1), section 1 (6) and section 1 (9) of Part I of the

Interstate Commerce Act, and having made the other findings required by said paragraph:

It is ordered, that the above-named defendants, or either of them, be, and they are hereby, notified and required to cease and desist, on or before the 30th day of August 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

It is further ordered, that said defendants, or either of them, be, and they are hereby, notified and required to establish and put in force, on or before the 30th day of August 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipments of livestock carried over defendants' lines and consigned thereto.

And it is further ordered, that this order shall remain in full force and effect until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*"

By request, the effective date of the foregoing order was postponed from time to time, and finally to the — day of June 1947.

VI

The record before the Commission shows conclusively that Swift & Company at all times had full knowledge of the Stock Yards' continued assertion of its complete ownership, and reservation of control of use, of track 1619 and the fact that the Stock Yards reserved the right by agreement to terminate the use of said track.

Swift & Company earlier and successfully had negotiated for its own private sidetrack to be connected directly with the New York Central's main track and right of way at the north
280 end of West 63rd Street (Plaintiff's Exhibit 11, with map and letters attached), but this opportunity of securing service by means of a direct connection to the railroad company's main track was abandoned by Swift & Company as too expensive and Swift & Company then (in 1910) sought and obtained switching service to its private sidetrack, by the use of Stock Yards' 1,619 feet of track, the construction of an extension of 793 feet of track to the southerly end of said Stock Yards track (being a part of track known as No. 245), and a wye track in connection therewith and extending said wye track across West 65th Street, in order to move cars thereover to Swift Company's private sidetrack.

VII

At all times, Stock Yards consistently, constantly, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Swift & Company and six or seven other packing plants are served by the New York Central traversing Stock Yards' 1,619 feet of track with the consent of the Stock Yards for delivery of all classes of freight except livestock. Every shipper serving or being served by the use of said 1,619 feet of track has had full knowledge of Stock Yards' said ownership and control of said track. No one has been led to act to his harm by any sufferance or acquiescence by the Stock Yards in the use permitted of its track or by any failure upon the part of Stock Yards more openly to assert its complete ownership or to restrict its use. There is no evidence that Stock Yards has ever acquiesced in any use of its land or said track by the Railroad or Swift & Company, except under the provisions of the sidetrack agreement. The entrance upon the land of the Stock Yards and the use of its track were not by sufferance, but, from beginning to the end, under the provisions of a written contract, expressly asserting ownership and reserving therein the property right of Stock Yards, limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively, all of which were well understood by Swift & Company, as well as by the Railroad.

In view of the foregoing facts, we think the findings of
281 the Commission with respect to Stock Yards' 1,619 feet of track for a number of years having been devoted to a public use is without legal support in the record. Certainly, upon these facts and upon the record, there has been no such devotion of said 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company system over which the latter may lawfully move shipments of freight or livestock to the Swift & Company plant without permission of the owner.

VIII

The record is clear, and the Commission finds, that each of Swift & Company's three-named competitors; i. e., the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, have constructed their own individual private sidetracks to connect directly with the main line railroad and right-of-way of the New York Central, and delivery to each of said three-named competitors is rendered without using any track belonging to Stock Yards. The physical conditions existing with

respect to reaching these three plants are therefore definitely different from the conditions attendant upon reaching Swift & Company's plant.

IX

Railroad plaintiffs urge the point that the Commission's order would require the railroads to disregard the practices and rules promulgated by the Commission in connection with Ex Parte 104, part II, Terminal Services, with respect to placing and spotting of cars on sidetracks of private industries. In view of our findings with respect to the lack of legal support for other parts of the Commission's order, we make no finding with respect to this phase.

282 CONCLUSIONS OF LAW

I

The Interstate Commerce Commission transcended its constitutional and statutory powers when, in its order, it effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company, without due process of law. If the Commission lawfully may compel the New York Central to use Stock Yards' 1,619 feet of track as the railroad's own track, or as one which it controls, it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess.

II

The Interstate Commerce Commission cannot lawfully order the railroads to do what by law is forbidden, by declaring that the track of The Cleveland Union Stock Yards Company under the circumstances is a part of the New York Central system. Such transfer of property lawfully cannot be made short of condemnation and compensation. These questions are left to the Courts and not to the Interstate Commerce Commission.

III

Jurisdiction over The Cleveland Union Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Interstate Commerce Commission to order The Cleveland Union Stock Yards Company to desist from the practice of asserting or exercising complete ownership of and control over its property.

IV

For the purpose of this case the Court assumes, without deciding, that under the Elkins Act, Section 42, Title 49 U. S. C., the Interstate Commerce Commission has jurisdiction over the Stock Yards Company, since it has been made a party in the case, and has the power to enter a lawful order affecting the Stock Yards Company in respect of matters in which the
283 Commission has authority.

V

The Cleveland Union Stock Yards Company is a noncarrier corporation organized under the laws of the State of Ohio in 1893, and it is engaged in a general stockyard business at Cleveland, Ohio. It is posted as a stockyard in accordance with the provisions of the Packers and Stockyards Act and it is thereby subjected to the jurisdiction of the Secretary of Agriculture of the United States.

VI

Whatever may be the legal status of the contract between the Railroad Company and The Cleveland Union Stock Yards Company, restricting the use of said 1,619 feet of track against delivery of livestock to the plant of Swift & Company, the Interstate Commerce Commission cannot lawfully rectify such contract by penalizing The Cleveland Union Stock Yards Company and taking part of its property.

VII

The Cleveland Union Stock Yards Company has never at any time dedicated said 1,619 feet of track to public use as a public highway or a part of the railroad system. It has constantly, by virtue of sidetrack agreements or contracts, asserted ownership and reserved property rights therein.

VIII

The Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.

Although the Commission holds that said 1,619 feet of track is now and for some years has been devoted to public use this is far

from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period
284 it has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of said 1,619 feet of track has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company more openly to assert its complete ownership and restrict its use.

IX

The constant, consistent, and notorious control reserved in written contracts between the railroad and Stock Yards is a sufficient bar to any legal finding that said Stock Yards' 1,619 feet of track had been devoted to the public use, in the sense that the Stock Yards has surrendered some portion of its title or that the track thereby has become a public highway of common carrier. There has not been any such devotion of Stock Yards' 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company's system under the provisions of Section 1 (3) (a) of the Act, over which track the railroad lawfully may move shipments of freight or livestock to the Swift & Company plant.

X

The Interstate Commerce Commission erred as a matter of law in ordering The Cleveland Union Stock Yards to devote the use of its said 1,619 feet of track and the property underlying the same for delivery of livestock to Swift & Company.

XI

To require the service sought by Swift & Company, not only would amount to appropriation of the property of The Cleveland Union Stock Yards Company for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

XII

In view of the undisputed disparity existing between the direct private sidetrack connections of Swift & Company's three
285 named competitors and Swift & Company's own indirect private sidetrack connection the Commission exceeded its powers and authority in undertaking to invoke in Swift & Com-

pany's behalf the powers of the Commission under the provision of Section 1 (9) of the Act.

Notwithstanding the similarity of active competition and other phases of the same general business in which Swift & Company and its three competitors are engaged, the pronounced dissimilarity in track connections mentioned above and the failure of Swift & Company to bring itself within the purview of Section 1 (9), with respect to its own track connections, removes any basis for holding that there is any discrimination whatsoever against Swift & Company, or any undue and unreasonable prejudice and disadvantage to Swift & Company in violation of Section 3 (1) of the Act with respect to delivery of carload shipments of livestock.

XIII

In view of the full knowledge by the complaining shipper of limitations placed upon the railroad's use of another private sidetrack, no legal basis exists for a finding of any violation of Section 1 (6) of the Act.

XIV

No provision is found in Section 1 (3) (a) of the Act to the effect that private property used by a carrier under contract for limited purposes thereby becomes a railroad for unlimited use. With the long history of the limited use permitted and made of Stock Yards' 1,619 feet of track and the full knowledge by the complaining shipper of such limited use, there is not any basis in law for a finding that the use of that track for said limited purposes constitutes it a part of the railroad system for the benefit of the shipper under the provisions of Section 1 (3) (a).

XV

Where, as in this case, the record before the Commission shows that a shipper had the opportunity of constructing its own private sidetrack to connect directly with the main line railroad and
286 right-of-way of the Railroad and such arrangement was available and could be operated with safety and the shipper discards that arrangement and chooses to obtain service to its private track by the use of another privately owned track, the ownership and control of which was notorious and apparent at all times, there is no legal support for a finding to the effect that said complaining shipper is entitled to continuous service to its plant, nor is there any legal basis for a finding of a violation of Section 1 (9) of the Act. There is no legal support for the authority or power of the Commission to require railroads to render service

in making direct delivery to the private sidetrack of a shipper where there is a legal or physical obstacle preventing such service and where the complaining shipper is, as in this case, well aware of the permissive use only of an intervening private track granted by its owner to the railroads. The fact that the railroads may have gained some benefit for a shipper in obtaining limited use of a privately owned track for a period of time cannot be found to have ripened into a right to require the railroad to provide the use of said intervening privately owned track for the further benefit of the shipper.

XVI

A railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in fact available for use. Common carrier services over private sidings and private industrial tracks cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevent it from entering upon those tracks, nor is it within the jurisdiction of the Commission to order a carrier, or any other party, to take steps to remove such obstructions.

XVII

The complainants herein are entitled to the relief prayed for; the Report and Order of the Commission are beyond the lawful authority of the Commission and wholly illegal and void; said Order is hereby vacated and set aside and the enforcement thereof perpetually restrained and enjoined; The Cleveland Union
287 Stock Yards Company is hereby declared to have the legal right to restrict the use of its industrial sidetrack for the protection of its business; it had, and has, the right to collect such compensation as it deems proper; it had and has the lawful right to cancel its sidetrack agreement with The New York Central Railroad Company and it had and has the legal right to withdraw entirely the use of its sidetrack for the benefit of Swift & Company and other packers and shippers located upon it.

Counsel for plaintiffs will submit order for appropriate judgment in accordance herewith.

(S) FLORENCE E. ALLEN,
Circuit Judge.

(S) PAUL JONES,
District Judge.

(S) E. B. FREED,
District Judge.

MAY —, 1947.

288 In the District Court of the United States for the Northern District of Ohio, Eastern Division

Civil No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Order and judgment

Filed May 14, 1947

These two causes having been duly and properly submitted to this legally convened statutory three-judge court upon plaintiffs' motion for a preliminary injunction and complaint praying for a temporary and permanent injunction of enforcement of and to vacate, set aside, suspend, and annul the order of the Interstate Commerce Commission, entered May 3, 1946, in the proceeding entitled Swift and Company vs. The Baltimore and Ohio Railroad Company, et al., Docket No. 28714, and Answers of the defendants herein, United States of America and the Interstate Commerce Commission, and intervener Swift and Company, praying that the within complaint be dismissed, and the cause having been taken under advisement by the court, and now the court being fully advised in the premises and having filed and entered of record its opinion, findings of fact, and formal conclusions of law, separately stated,

It is ordered, adjudged, and decreed, that a permanent injunction be and hereby is granted, permanently enjoining the enforcement of said Order of the Interstate Commerce Commission here-

inabove described and that said order be and hereby is vacated, set aside, and annulled.

(S) FLORENCE E. ALLEN,
United States Circuit Judge.
(S) PAUL JONES,
United States District Judge.
(S) E. B. FREED,
United States District Judge.

Approved as to form only:

F. KAVANAGH,
Asst. U. S. Attorney.

289 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Petition for appeal

The United States of America, the Interstate Commerce Commission, and Swift & Company, defendants in the above-entitled causes, feeling themselves aggrieved by the final decree of the United States District Court for the Northern District of Ohio, Eastern Division, entered in said court on May 14, 1947, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendants consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

290 Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated July 11, 1947.

/S/ George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

/S/ John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

/S/ Edward J. Hickey, Jr.,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
For the United States of America.

/S/ Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel.

/S/ Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

/S/ Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

291 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Order allowing appeal

In the above-entitled causes, the United States of America, the Interstate Commerce Commission, and Swift & Company, defendants therein, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court entered May 14, 1947, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided:

It is ordered and decreed, that the appeal be, and the same is hereby allowed as prayed for.

Dated July 11, 1947.

By PAUL JONES,
United States District Judge.

292 [Citation in usual form, filed July 11, 1947, omitted in printing.]

293 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Notice of appeal

To the Attorney General for the State of Ohio:

You are hereby notified that the District Court of the United States for the Northern District of Ohio, Eastern Division, on

July 11, 1947, filed and entered an order allowing an appeal by the United States and the Interstate Commerce Commission to the Supreme Court of the United States from a decree filed and entered on May 14, 1947, in the above-entitled case, and that the citation signed by such court on June 1947, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents:

294 1. The citation referred to above.

2. Petition for and order allowing said appeal.

3. Defendants' jurisdictional statement and assignment of errors pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States.

4. Statement required to be served upon appellee by said Rule 12.

This notice is given you pursuant to the provisions of U. S. Code, Title 28, Sec. 27a, enacted March 3, 1911, c. 231, Sec. 210.

Dated July 11, 1947.

(S) George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

(S) John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

(S) Edward J. Hickey,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
For United States of America.

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel.

(S) Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

(S) Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

295 CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing notice, together with attachments as therein listed, by this day mailing a copy of

the same to the Attorney General for the State of Ohio at the State House, Columbus, Ohio.

(S) Gordon C. Locke,
GORDON C. LOCKE,
Attorney for Interstate Commerce Commission.

296 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Assignment of errors

Now come the United States of America, the Interstate Commerce Commission, and Swift & Company, defendants in the above-entitled causes, and in connection with their appeal herein, file the following assignment of errors upon which they will rely in their prosecution of said appeal to the Supreme Court of the United States from the final decree of the District Court dated May 14, 1947. The District Court erred:

1. In failing to dismiss plaintiffs' suits and to deny the relief applied for by plaintiffs.

2. In failing to hold that the order of the Interstate Commerce Commission dated May 3, 1946, in a proceeding docketed as No. 28714, Swift & Co. v. Baltimore & Ohio Railroad Co., et al., 266 I. C. C. 55, is in all respects valid and lawful.

297 3. In undertaking to substitute its judgment for that of the Interstate Commerce Commission with respect to transportation questions confided by law to the Interstate Commerce Commission.

4. In holding that the Commission's finding "that track 1619 for a number of years has been devoted to public use does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively."

5. In holding that "upon these facts and upon the record there has been no such devotion of track 1619 to public use as to amount to a dedication of the Stock Yards' property as a public highway or as a part of the Railroad Company's system over which the

latter lawfully may move shipments of freight or livestock to the Swift & Company plant."

6. In holding that "the Stock Yards Company never had acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts."

7. In holding that: "Although the Commission holds that track 1619 is now and for some years has been devoted to the public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track."

8. In failing to hold that the use of the track of the Stock Yards Company has made it a part of the New York Central Railroad system, and that the Railroad cannot refuse to comply with the Commission's order.

298 9. In holding that "If the Commission lawfully may compel the Railroad Company to use track 1619 as its own or as one which it controls it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess."

10. In holding that the "order effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company without due process of law."

11. In holding that jurisdiction over "the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property."

12. In holding that the Commission cannot lawfully order the Railroad to comply with its order by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system; and in holding that such transfer of property lawfully cannot be made short of condemnation and compensation.

13. In holding that "The constant, consistent, and notorious control reserved by contracts between the Railroad and the Stock Yards Company is sufficient bar to any legal finding that track 1619 had been devoted to the public use in the sense that the Stock Yards Company has surrendered some portion of its title or that the track thereby has become a public highway or common carrier."

14. In holding that "To require the service sought by Swift & Company not only would amount to appropriation of the Stock

Yards Company's property for the use of Swift & Com-
299 pany, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks."

15. In holding that "the complainants each are entitled to the relief prayed for."

16. In holding that "enforcement of the order of the Commission will be permanently enjoined."

17. In finding as a fact that Track 1619 was a private side track.

18. In finding that the record before the Commission shows conclusively that Swift & Company at all times had full knowledge of the Stock Yards' continued assertion of its complete ownership, and reservation of control of use, of Track 1619, and the fact that the Stock Yards reserved the right by agreement to terminate the use of said track.

19. In finding as a fact that every shipper served or being served by the use of Track 1619 has had full knowledge of Stock Yards' ownership and control of said track.

20. In finding as a fact that there is no evidence that Stock Yards has ever acquiesced in any use of its land or said track by the Railroad or Swift & Company, except under the provisions of the side track agreement.

21. In finding as a fact that the finding of the Commission with respect to Stock Yards' Track 1619 for a number of years having been devoted to public use is without legal support in the record.

22. In substituting its judgment for that of the Commission, and in finding that the physical conditions existing with respect to reaching the plants of the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, are definitely different from the conditions attendant upon reaching Swift & Company's plant.

300 23. In concluding as a matter of law, that the Interstate Commerce Commission transcended its constitutional and statutory powers when, in its order, it effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company, without due process of law.

24. In concluding as a matter of law that the Interstate Commerce Commission cannct lawfully order the railroads to comply with the Commission's order by declaring that the track of The Cleveland Union Stock Yards Company under the circumstances is a part of the New York Central system.

25. In concluding as a matter of law that jurisdiction over The Cleveland Union Stock Yards Company, if it does exist under

the meaning of the Elkins Act, does not furnish constitutional or legal power in the Interstate Commerce Commission to order The Cleveland Union Stock Yards Company to desist from the practice of asserting or exercising complete ownership of and control over its property.

26. In concluding as a matter of law that whatever may be the legal status of the contract between the Railroad Company and The Cleveland Union Stock Yards Company, restricting the use of said 1,619 feet of track against delivery of livestock to the plant of Swift & Company, the Interstate Commerce Commission cannot lawfully rectify such contract by penalizing The Cleveland Union Stock Yards Company and taking part of its property.

27. In concluding as a matter of law that The Cleveland Union Stock Yards Company has never at any time dedicated said 1,619 feet of track to public use as a public highway or a part of the railroad system.

301 28. In concluding as a matter of law that the Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts.

29. In concluding as a matter of law that although the Commission holds that said 1,619 feet of track is now and for some years has been devoted to public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property.

30. In concluding as a matter of law that the constant, consistent, and notorious control reserved in written contracts between the railroad and Stock Yards is a sufficient bar to any legal finding that said Stock Yards' 1,619 feet of track had been devoted to the public use, in the sense that the Stock Yards has surrendered some portion of its title or that the track thereby has become a public highway or common carrier.

31. In concluding as a matter of law that the Commission erred in ordering The Cleveland Union Stock Yards to devote the use of its said 1,619 feet of track and the property underlying the same for delivery of livestock to Swift & Company.

32. In concluding as a matter of law that to require the service sought by Swift & Company not only would amount to appropriation of the property of The Cleveland Union Stock Yards Company for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connection switches or sidetracks.

33. In concluding as a matter of law that in view of the undisputed disparity existing between the direct private sidetrack connections of Swift & Company's three-named competitors and Swift & Company's own indirect private sidetrack connection

the Commission exceeded its powers and authority in
302 undertaking to invoke in Swift & Company's behalf the powers of the Commision under the provision of Section 1 (9) of the Act.

34. In concluding as a matter of law that in view of the full knowledge by the complaining shipper of limitations placed upon the Railroad's use of another private sidetrack, no legal basis exists for a finding of any violation of Section 1 (6) of the Act.

35. In concluding as a matter of law that no provision is found in Section 1 (3) (a) of the Act to the effect that private property used by a carrier under contract for limited purposes thereby becomes a railroad for unlimited use.

36. In concluding as a matter of law that a railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in fact available for use.

37. In concluding as a matter of law that the complainants herein are entitled to the relief prayed for.

38. In entering its final decree of May 14, 1947, setting aside and annulling the Commission's order of May 3, 1946.

Wherefore, Defendants pray that the said decree be reversed.

Dated July 11, 1947.

(S) George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General,

(S) John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,

(S) Edward J. Hickey, Jr.,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
For United States of America.

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,

(S) Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

(S) Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

305 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Order as to exhibits

Dated July 11, 1947

In accordance with the provisions of Section 47A of Title 28, U. S. Code, and with the provisions of defendants' praecipe for transcript of record on appeal of the above-entitled matter to the Supreme Court of the United States:

It is hereby ordered, that the documents and papers received in evidence in the District Court in the trial of this cause, and the stenographer's transcript of the proceedings held before the three-judge court on February 25, 1947, may all be forwarded, in lieu of copies of such documents and papers, to the Clerk of the Supreme Court of the United States as a part of the transcript of the record on appeal herein.

306 Dated this 11 day of July 1947.

[S] Paul Jones,
PAUL JONES,
United States District Judge.

Service of order as to exhibits is hereby acknowledged this 11 day of July 1947.

The Baltimore and Ohio Railroad Company, (S) Baker, Hosteller & Patterson, Baker, Hosteller and Patterson, by (S) Dwight B. Buss, Dwight B. Buss, Its Attorneys, 1956 Union Commerce Building, Cleveland, Ohio; The Pennsylvania Railroad Company, (S) Squire, Sanders & Dempsey, Squire, Sanders and Dempsey, by (S) George H. P. Lacey, George H. P. Lacey, Its Attys., 1857 Union Commerce Building, Cleveland, Ohio; The Erie Railroad Company, (S) Willis T. Pierson by P. H. Donovan, Willis T. Pierson, General Counsel, Midland Building, Cleveland, Ohio; The Wheeling and Lake Erie Railway Co., (S) M. B. & H. H. Johnson, M. B. and H. H. Johnson, by (S) John A. Duncan, John A. Duncan, Its Attorneys, 1669 Union Commerce Building, Cleveland 14, Ohio; The New York Central

Railroad Company, by (S) Robert R. Pierce by A. C. Russell, Robert R. Pierce, Chief Assistant General Attorney, 1324 West Third Street, Cleveland 13, Ohio; The Cleveland Union Stock Yards Company, by (S) M. S. Farmer by E. J. Warrick, M. S. Farmer, Its Attorney, 802 Engineers Bldg., Cleveland 14, Ohio.

307 In the District Court of the United States

Civil No. 24435

Civil No. 24479

[Title omitted.]

Praecipe for transcript of record

To the Clerk of the above-named Court:

You will please prepare a transcript of the record in the above-entitled consolidated causes to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Motion for preliminary injunction in Civil No. 24435.
2. Affidavit of R. R. Pierce in Civil No. 24435.
3. Complaint in Civil No. 24435 and Exhibits A–E, inclusive.
4. Answer of United States in Civil No. 24435.
5. Answer of Interstate Commerce Commission in Civil No. 24435.

308 6. Answer of Swift & Company in Civil No. 24435 and exhibit attached thereto.

7. Order of Court dated January 2, 1947, assembling a three-judge court.
8. Motion for preliminary injunction in Civil No. 24479.
9. Affidavit of M. S. Farmer in Civil No. 24479.
10. Complaint in Civil No. 24479.
11. Order of Court dated February 25, 1947, consolidating the two cases.
12. Answer of United States in Civil No. 24479.
13. Answer of Interstate Commerce Commission in Civil No. 24479.
14. Petition of Swift & Company for leave to intervene in Civil No. 24479.
15. Answer of Swift & Company in Civil No. 24479.
16. Minutes of hearing held before three-judge court at Cleveland, Ohio, on February 25, 1947, including record introduced at such hearing.

17. Record in Interstate Commerce Commission Docket No. 28714, including testimony and exhibits before Interstate Commerce Commission at hearing held on February 25, 1947, before three-judge court.

18. Two oral arguments before Interstate Commerce Commission received by three-judge court at hearing on February 25, 1947.

19. Petition of railroads for reconsideration filed with the Interstate Commerce Commission in Docket No. 28714, and reply of Swift & Co. to such petition, received in evidence by three-judge court on February 25, 1947.

20. Opinion of court, filed March 11, 1947.

21. Plaintiffs' suggested findings of fact and conclusions of law.

22. Findings of fact and conclusions of law suggested by defendants, United States, Interstate Commerce Commission and Swift & Company.

23. Letter of defendants to United States Attorney Miller dated April 11, 1947, transmitting defendants' suggested findings and conclusions and objecting to findings and conclusions suggested by plaintiffs.

309 24. Plaintiffs' memorandum of objections and exceptions to defendants' suggested findings and conclusions.

25. Findings of fact and conclusions of law entered by court on May 9, 1947.

26. Final order and judgment dated May 14, 1947.

27. Petition for appeal.

28. Order allowing appeal.

29. Citation on appeal.

30. Notice of appeal to plaintiffs.

31. Notice of appeal to Attorney General of Ohio.

32. Assignment of errors.

33. Statement by defendants-appellants directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States and proof of service.

34. Order of District Judge as to exhibits.

35. This praecipe.

Dated July 11, 1947.

(S) George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General,

(S) John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,

(S) Edward J. Hickey, Jr.,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General,
For United States of America.

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,

(S) Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

(S) Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

310 Service of Praecipe is hereby acknowledged this 11 day of July 1947.

The Baltimore and Ohio Railroad Company, (S) Baker, Hosteller and Patterson, Baker, Hosteller and Patterson, by (S) Dwight B. Buss, Dwight B. Buss, Its Attorneys, 1956 Union Commerce Building, Cleveland, Ohio; The Pennsylvania Railroad Company, (S) Squire, Sanders & Dempsey, Squire, Sanders and Dempsey, by (S) George H. P. Lacey, George H. P. Lacey, Its Attys., 1857 Union Commerce Building, Cleveland, Ohio; The Erie Railroad Company, (S) Willis T. Pierson, by P. H. Donovan, Willis T. Pierson, General Counsel, Midland Building, Cleveland, Ohio; The Wheeling and Lake Erie Railway Company, (S) M. B. & H. H. Johnson, M. B. and H. H. Johnson, by (S) John A. Duncan, John A. Duncan, Its Attorneys, 1669 Union Commerce Building, Cleveland 14, Ohio; The New York Central Railroad Company, by (S) Robert R. Pierce by A. C. Aussell, Robert R. Pierce, Chief Assistant General Attorney, 1324 West Third Street, Cleveland 13, Ohio; The Cleveland Union Stock Yards Company, by (S) M. S. Farmer by Elmer J. Warrick, M. S. Farmer, Its Attorney, 802 Engineers Bldg., Cleveland 14, Ohio.

311 [Clerk's certificate to foregoing transcript omitted in printing.]

314 Before the Interstate Commerce Commission
Docket No. 28714

SWIFT & COMPANY, COMPLAINANT

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., DEFENDANTS

Reporter's transcript of hearings

CLEVELAND HOTEL,
Cleveland, Ohio, Wednesday, April 22, 1942.

Met, pursuant to notice, at 2:00 p. m., E. W. T.

Before PAUL O. CARTER, Examiner.

Present: R. D. Rynder, 4115 Packers Ave., Chicago, Illinois, appearing for Swift & Company, Complainants. W. N. King, 1324 West Third Street, Cleveland, Ohio, appearing for the New York Central Railroad Company, Defendant. R. R. Pierce, 1324 West Third Street, Cleveland, Ohio, appearing for the New York Central Railroad Company, Defendant. D. P. Connell, 1324 West Third Street, Cleveland, Ohio, appearing for the New York Central Railroad Company, Defendant. John J. Fitzpatrick, 3006 Terminal Tower, Cleveland, Ohio, appearing for the N. Y. C. & St. L. Railroad Company, Defendant. Kemper A. Dob-
315 bins, 3013 Terminal Tower, Cleveland, Ohio, appearing for the N. Y. C. & St. L. Railroad, Defendant. A. Z. Baker, 3200 W. 65th St., Cleveland, Ohio, appearing for the Cleveland Provision Company, Defendant. C. B. Heinemann, 307 McLachlen Building, Washington, D. C., appearing for the Livestock Terminal Service Company, Defendant.

317 PROCEEDINGS

Exam. CARTER. Come to order, please, gentlemen.

The Interstate Commerce Commission has set at this time and place Docket No. 28714, Swift & Company, versus the Baltimore & Ohio Railroad Company, et al.

Who appears for the Complainant?

Mr. RYNDER. R. D. Rynder.

Exam. CARTER. Who appears for the Defendants?

Mr. KING. R. R. Pierce, John J. Fitzpatrick, D. P. Connell, W. N. King.

Mr. DOBBINS. And also Kemper A. Dobbins.

Mr. HEINEMANN. C. B. Heinemann, appearing for the Livestock Terminal Service Company.

Mr. BAKER. A. Z. Baker, appearing for the Cleveland Union Stock Yards Company.

Exam. Carter. With reference to free copies, Mr. Rynder, you are to receive a copy for the Complainant.

Mr. Rynder. I would like to.

Mr. Heinrmann. We will let the railroads have it.

Mr. King. I will take it.

Exam. Carter. No pleadings of intervention to be filed?

Mr. King. No.

Exam. Carter. The flyleaf of the docket contains this language: "It is alleged—" I didn't write this, so, I don't know whether it is correct— "It is alleged that the refusal of

318 Defendants to deliver carload shipments of livestock to complainant's sidetrack facilities at its plant in Cleveland, Ohio, has and will subject complainant to the payment of charges for the transportation of livestock which were, are, and will be unreasonable, unjustly discriminatory, unduly preferential of competitors located at Cleveland, Ohio, and unjustly prejudicial to complainant, in violation of sections 1 (3), (5), (18), and (20), also in violation of sections 2 and 3 of the Interstate Commerce Act.

The Commission is asked to establish tariff provisions under which complainant may have transported to its plant at Cleveland, Ohio, in interstate commerce, carload shipments of livestock at rates not in excess of the railroad defendants' line-haul rates for such transportation and under which the defendants will restore to complainant's plant at Cleveland the service and deliveries in connection with carload shipments of livestock which were performed by said defendants prior to November 12, 1938, and to award reparation including shipments which may have moved during the pendency of this proceeding."

Is that in substance correct?

Mr. Rynder. I think that is correct in substance, Mr. Examiner. If in any respect it eliminates any allegation of the complaint, I assume that we can stand on the complaint.

Exam. Carter. Oh, yes.

319 Mr. Rynder. Mr. Examiner, before we call a witness, we have distributed certain exhibits, and perhaps it will be easier to refer to them if I have them marked for identification now.

The first one is a map, which will be marked Exhibit 1. The second one is a photostatic copy of the tariff of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company; that has two sheets. The next one is a photostatic copy of the tariff of the New York Central Railroad Company, which will be marked Exhibit 3. The next one is a one-page copy of a letter addressed to Mr. C. J. Brister which will be marked Exhibit No. 4. The

next one is a copy of a letter addressed to Mr. W. A. Mayfield which will be marked for identification Exhibit 5. The next one is a copy of a bill of lading which will be marked Exhibit 6. The next one is a reproduction of Appendix I, II, and III of the Interstate Commerce Commission's decision in Ex Parte 127, and that will be Exhibit 7. The next one is a reproduction of Exhibit 312 filed in Ex Parte 127 which will be Exhibit 8.

(Complainant's Exhibits Nos. 1 to 8, Witness G. F. Tally, marked for identification.)

Mr. RYNDER. Now, I will call Mr. Tally.

G. F. TALLY was sworn and testified as follows:

Direct examination by Mr. RYNDER:

Q. Mr. Tally, state your name please.

320 A. G. F. Tally.

Q. Please state your residence and position.

A. I live in Chicago, Illinois, and I am assistant traffic manager of Swift & Company, Chicago, Illinois.

Q. Are you familiar with the operations conducted by Swift & Company at its Cleveland plant?

A. Yes, sir.

Q. Have you examined the property at and around that plant and the stockyards across the street, and so forth?

A. Yes, sir.

Q. Is Swift & Company a corporation?

A. Yes, sir.

Q. And where was it organized?

A. State of Illinois.

Q. In what business is it engaged?

A. In the packing-house business.

Q. Does it operate a plant at Cleveland, Ohio?

A. Yes, sir.

Q. In connection with the operation of this plant at Cleveland, Ohio, have you prepared an exhibit in the form of a map showing approximately the location of the plant, the streets, and various tracks?

A. Yes, sir.

Q. From what source did you obtain that map?

A. Well, it was taken from an exhibit filed by witness

321 E. J. Gibbons in I. C. C. Docket No. 28400.

Q. Exhibit 6?

A. Yes, sir.

Q. To your knowledge, does it represent with approximate correctness the locations indicated on it?

A. Yes, sir.

Q. Please proceed to describe the location of the Swift & Company plant and so forth with reference to the map which is Exhibit 1?

A. Referring to this map, Exhibit 6, the packing plant——

Q. Exhibit 1?

A. I mean Exhibit 1—pardon me—the plant that Swift & Company is located between West 65th Street and West 63rd Street and between Clark Avenue and Storer Avenue. The plant itself appears on this map immediately south of the plant of the Federal Packing Company and bears the legend "Swift & Co." This plant is served by a private sidetrack which can be identified on this map. This sidetrack connects with the New York Central Railroad at a point shortly west of 65th Street. From this connection the tracks extend across 65th Street and easterly across Swift and Company's property to the rear of its packing plant. This plant is equipped for the unloading and holding of livestock. At the rear of the plant is a platform where livestock cars can be placed for unloading. When the car door is opened the stock is driven through a short passage into pens equipped
322 for the holding and care of livestock. These pens cover an area of approximately four thousand three hundred eighty square feet or one-tenth acres and contain approximately eight pens. They have a capacity of eight cars of livestock. In this connection scale facilities are provided so that the weight of the livestock can be obtained for the purpose of settlement of freight charges. This scale is approved by and under the jurisdiction of the Weighing and Inspection Bureau, and its weights are accepted by the railroads.

Q. Mr. Tally, will you proceed to state the tariff history to the extent necessary in the present tariff situation with respect to the delivery of livestock at the Swift & Company plant at Cleveland?

A. At this point I should like to relate a situation wherein a common carrier has limited itself to the commodities it will handle for the public. Prior to November 12, 1938, the carrier, then known as the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, published in its tariff ICC No. 8785, which is a switching tariff applicable at various points on that railroad, including Cleveland, Ohio, a switching charge of $3.15 between Swift and Company, an industry served by its railroad and points of interchange with the Baltimore & Ohio Railroad, Erie Railroad, New York Central Railroad, New York, Chicago & St. Louis Railway, Pennsylvania Railroad, and Wheeling & Lake Erie Rail-
323 road. At that time livestock and all other commodities were moving from and to Swift and Company's industrial

locations, and the rates published from and to Cleveland, Ohio, were applied between the Cleveland, Cincinnati, Chicago & St. Louis Railway and all other lines serving Cleveland, Ohio. In the case of the CCC & St. L. Railway rates published to Cleveland applied to their team tracks and all industrial sidings served by that railroad. Insofar as other carriers serving Cleveland are concerned, rates published by them from and to Cleveland applied to Swift and Company's industrial siding through the medium of absorption of the CCC & St. L. Railway's switching charge of $3.15 which was applicable between the point of interchange of the CCC & St. L. Railway and the other railroads defendants in this case. There was nothing peculiar or different in this arrangement than applies at practically all other points within the United States. Under this arrangement Swift and Company was entitled to plant delivery on all of its shipments, including livestock.

Effective with November 12, 1938, in supplement 44 to CCC & St. L. Railway Company's tariff ICC No. 8785, at which time this switching charge had become $3.47, it was restricted so as not to apply on livestock.

I should like here to offer for identification my Exhibit No. 2, which is a photostatic copy of the title page and page 13 of supplement 50 to CCC & St. L. Railway Company's tariff ICC No. 8785. Attention is directed to page 13 which shows
334 that at Cleveland, Ohio, Swift & Company is an industry in the "Upper Grade Location" of the Cleveland switching district. The switching charge between the points of interchange with the railroads serving Cleveland as shown at the top and Swift and Company's industry does not apply on livestock as exemplified by the explanation of the circle 2 which appears in front of the $3.47 charge. The explanation of this circle 2 reference is in the body of the item and provides this rate will not apply on livestock. Therefore, on and after this date this common carrier did not publish a switching charge between Swift and Company's industrial location and interchange with other railroads on livestock, although at the same time it did not restrict its switching charge so as not to apply on livestock between points of interchange with the other defendant carriers and such industries as the Ohio Provision Company and the Long Dressed Beef Company, located on the rails of the CCC & St. L. Railway in the same upper grade location as is Swift and Company. The railroad, however, restricts this switching charge so as not to apply on livestock to certain other packing house industries which are located in the same general district as is Swift & Company. This information is not shown in my Exhibit 2, but I have before me a copy of supple-

ment No. 50 to this tariff which substantiates the statements
325 I have just made. I have not reproduced supplement No. 44 to this tariff which originally made the change by restricting the switching charge so as not to apply on livestock because it was not available in my office. Supplement 50, however, was available and contains the information and facts outlined. I have it in my possession if anyone cares to review it.

My next exhibit——

Q. Now, what is your next tariff exhibit?

A. My next Exhibit No. 3 is a photostatic copy of the title page and page 2 of supplement 67 to New York Central Railroad Company tariff ICC No. 8785. Attention is directed to page 2 which became effective October 11, 1939, and provided for the change in the name of the CCC & St. L. Railway Company to the New York Central Railroad Company. On and after October 11, 1939, therefore, the New York Central Railroad by this adoption notice, took over the tariffs of the CCC & St. L. Railway Company and thereafter the CCC & St. L. Railway became known as the New York Central Railroad. In other words, all industries heretofore shown as being located in the Cleveland switching district on the CCC & St. L. Railway became industries located on the New York Central Railroad. This tariff and its effective supplements are in effect today, and the title page of current supplements carries the name New York Central Railroad Company in place of the Cleveland, Cincinnati, Chicago & St. Louis
326 Railway Company. For purposes to be brought out later I should like, at this point, to state that, with the adoption by the New York Central of the CCC & St. L. Railway Company tariff, this switching charge ceased to become applicable from points of interchange with the New York Central Railroad because it then became the New York Central Railroad and there could be no point of interchange with its own railroad although the tariff still contains "between industries in Cleveland located on the New York Central Railroad and points of interchange with the New York Central W," although there is no definition of the letter "W" nor is there any explanation as to why a railroad publishes a switching charge between points of interchange on its railroad. The livestock tariffs of the New York Central Railroad publish rates to the city of Cleveland, Ohio, without any restriction as to their application to points of destination located on or served by their rails in Cleveland, Ohio. It is therefore reasonable to assume rates published to Cleveland, Ohio, by the New York Central Railroad, apply to all industrial locations, including Swift and Company, and no switching charge is necessary on traffic given a line haul movement by the New York Central Railroad. It is my contention therefore that the restriction that the switching rate

is not applicable to livestock between points of interchange with defendants other than the New York Central Railroad and
327 Swift and Company's industrial location does not have application so far as the New York Central Railroad is concerned and that further there is no necessity for a switching charge in making delivery of livestock shipments to Swift & Company's location when the New York Central Railroad receives a line haul.

Q. Just a minute, Mr. Tally; to sum up what you have been saying, is it your contention under the present condition of the tariffs, that you are entitled, so far as the tariff publication is concerned, to a delivery by the New York Central at your plant?

A. Yes, sir.

Q. Go ahead.

A. In support of that contention I should like to point out that the other defendant carriers publish rates on livestock to Cleveland, Ohio, which have application to all points served by each of these defendant railroads and where delivery is required at a location on another railroad, such as Swift and Company on the New York Central Railroad, they will absorb the switching charge of that other railroad in order to be competitive with the line-haul carrier serving the partic lar industry on traffic given a line-haul movement by the Nickel Plate Railroad, Pennsylvania Railroad, and the other defendant carriers other than the New York Central Railroad. The switching charge necessary to effect delivery at Swift and Company's plant does not apply on livestock.

328 By Mr. FITZPATRICK:

Q. Just to clear up something here, Mr. Tally, you have been referring to other defendant carriers other than the New York Central Railroad, don't you mean other the Cleveland Union Stock Yards Company and the Livestock Terminal Service Company, who are also defendants?

A. I'm referring to railroads that bring livestock into Cleveland, Ohio, as a line-haul carrier.

Q. That clears it up.

By Mr. RYNDER:

Q. Mr. Tally, has Swift & Company made certain demands upon the defendant railroads for the delivery of livestock at its plant?

A. Yes, sir; we have.

Q. Have you a copy of a demand of that kind?

A. I have; yes, sir.

Q. Please proceed to describe it.

A. We have made demands upon the defendant railroads for delivery of livestock at our plant, but those demands have been denied.

I offer as Exhibit No. 4, copy of a letter of August 14, 1941, addressed to the freight-traffic officers of the New York Central System, The New York, Chicago and St. Louis Railroad Company, the Wheeling and Lake Erie Railway Company, The Baltimore & Ohio Railroad Company, Pennsylvania Railroad, and Erie Railroad, in which we gave them notice that we would bill all
329 of our shipments of livestock for Cleveland for delivery at our plant in Cleveland and requested them to see that such delivery was made.

Q. What reply did you receive to that?

A. I next offer as my Exhibit No. 5 a letter signed by the traffic officers of said railroad companies, dated September 27, 1941, in which the railroads stated that they could not make delivery of livestock at our plant without traversing a track owned by the Cleveland Union Stock Yards Company.

Q. Have you a copy of a bill of lading illustrative of the method in which your shipments were billed to your plant?

A. I have, yes.

Q. Please describe it?

A. I offer as Exhibit No. 6 a copy of a bill of lading or livestock contract, dated at Indianapolis, Ind., September 24, 1941, signed by the New York Central Railroad Company and calling for transportation of a carload of sheep from Indianapolis, to "Swift & Co. Plant Delivery, Cleveland, Ohio." This is illustrative of the manner in which all of our billing of livestock shipments, destined to our Cleveland plant, was issued after our notice to the railroads of August 14, 1941, which is my Exhibit No. 4. So far as this particular shipment and all other shipments originating on the New York Central are concerned, or on which the New York Central receives a line haul into Cleveland, it is my contention, even under the present tariff situation as heretofore
330 described by me, no excuse existed for failure to make plant delivery of the livestock. This is because no publication of the switching charge was necessary to effect delivery on the New York Central lines in Cleveland of a shipment moving to Cleveland via the New York Central. In other words, the restriction of the switching charge which I have heretofore described would have no application to a shipment moving to Cleveland via the New York Central since the time when that line has taken over the CCC & St. L. and adopted all of its tariffs as it did on October 11, 1939. Nevertheless the New York Central Railroad declined to deliver the shipment covered by my Exhibit No. ——.

Q. 6?

A. 6, at Swift and Company's plant and did deliver it to the Cleveland Union Stock Yards. I have described this situation merely because it is illustrative. The same form of billing has been followed and the railroads in the same manner have refused to make delivery to Swift and Company's plant on all other similar shipments of livestock.

Q. Have you gained any information or understanding as to the excuse offered by the railroads for refusing to make such delivery of livestock to your plant?

A. My understanding of the excuse offered by the railroads for refusal to deliver livestock at our plant is that a portion of the track used in effecting such delivery is owned by the
331 *the* Cleveland Union Stock Yards Company. Referring to Exhibit No. 1, this portion of the track is immediately west of 65th Street, extending from a connection with the New York Central tracks (formerly CCC & St. L. tracks). Through the property of the Cleveland Union Stock Yards to another connection with the New York Central tracks near the plot of ground marked "Lasko Coal Co." on Exhibit No. 1. My understanding as to the ownership of this track is based upon statements made to Swift and Company or to me by the railroads serving Cleveland and upon statements made by Mr. A. Z. Baker, president of the Cleveland Union Stock Yards Company, in No. 284000, Ex. Parte No. 127, and in exhibits offered by Mr. Baker in connection with those cases. As supporting this information, I make reference to Exhibit 50 in No. 284000, which is a letter from Mr. F. O. Stafford, freight-traffic manager, New York Central Railroad, to the Secretary of the Interstate Commerce Commission, dated December 6, 1938. I can also refer to Exhibit 48, which is a letter of November 21, 1934, from the Cleveland Union Stock Yards Company to Mr. C. H. Williams of the New York Central Railroad, in which it is pointed out that track is leased by the stockyards to the railroads under an agreement dated June 16, 1924.

In this connection Mr. A. Z. Baker testified (docket 28400, transcript, p. 234) that a modification of the original side-
332 track agreement was finally agreed upon effective February 1, 1935, "which provided that the railroad should not have the free use of the tracks owned by the Cleveland Union Stock Yards for competitive traffic, that is, livestock."

I am not acquainted with the terms and conditions of the original agreement for the use of this track between the Cleveland Union Stock Yards and the trunk-line railroads. I am not acquainted with the details of this controversy between the Cleveland Union Stock Yards and the railroads, but I assume from the testimony I have heard, the exhibits in this group of cases,

and the letter of September 27, 1941, which is Exhibit No. 5, that the trunk-line railroads have been unwilling to pay the Cleveland Union Stock Yards the amount demanded by the stockyards for the use of its tracks in connection with the delivery of livestock. However, I do know it to be a fact that, as a result of certain transactions between the trunk-line railroads and the Cleveland Union Stock Yards, the railroads have declined to make delivery of livestock shipments at our plant or to make any delivery except through the Cleveland Union Stock Yards or more recently the facilities of the Livestock Terminal Service Company.

Q. Now, I believe it is alleged in the complaint that regardless of this treatment of livestock, the railroads do offer the same tracks, make delivery of all in-bound shipments to the Swift plant and accept delivery of all out-bound shipments. Will you please state what the facts are in that connection?

333 A. Regardless of the fact that the railroads have declined to deliver livestock at the facilities designed for such delivery at our plant, they have continued to deliver over the same tracks all other classes of in-bound traffic to our plant and to accept out-bound shipments over the same tracks from our plant. The in-bound shipments include all classes of supplies, amongst the principal of which might be mentioned such items as coal, salt, boxes, paper, lumber, and all other articles required at a packing house, including from time to time in-bound shipments of fresh meats and packing-house products. The out-bound shipments consist principally of fresh meats and packing-house products and they are transported out-bound over exactly the same tracks as those over which livestock would move in-bound to our plant. It is therefore, a fact that the railroads have not abandoned the use of this track for the general movement of freight to and from our plant, but have simply declined to deliver a single commodity; namely, livestock over those tracks.

Q. It is further alleged in the complaint that although the railroads refuse to deliver livestock to the Swift plant, they make delivery to certain other plants in Cleveland. What are the facts in that connection?

A. In paragraph VIII of our complaint we have alleged, that, in refusing to make livestock deliveries to our plant, the

334 railroads discriminate as between Swift and Company and other meat packers in Cleveland, Ohio. In my description of the tariff situation I have pointed out that the defendant railroads still provide delivery of livestock shipments at the flat Cleveland rates to the plants of the Lake Erie Provision Company, now known as the Cleveland Provision Company, the Long Dressed Beef Company, and the Ohio Provision Company. These

plants are in the same general district as the Swift plant and are so described in the tariff. I have examined the local situation to the best of my ability and I find that each of said companies; that is, the Cleveland Provision Company, Ohio Provision Company, and Long Dressed Beef Company, are engaged at their several locations in the processing of meat products. I am advised that the Ohio Provision Company receives and slaughters cattle, hogs, and sheep; that the Long Dressed Beef Company receives and processes cattle and hogs; and that the Cleveland Provision Company receives and processes cattle and some hogs. The Swift plant at Cleveland is engaged in receiving and processing all of these classes of livestock and, in a general way, it does and must obtain its supplies of livestock from the same general origin territory. It is apparent therefore that Swift and Company and the three companies named are engaged in the same locality in the same class of business.

I am also advised that the Cleveland Provision Company,
335 Long Dressed Beef Company, and Ohio Provision Company sell the products of their packing plants, which are in general the same as the products of the Swift plant, in the same general consuming territories, including Cleveland, and that there is active competition between the Swift plant and the three other packing plants in the sale of products.

The situation is that the three competitors just named can obtain delivery of livestock at their plants while such delivery is denied to the Swift plant.

Q. Mr. Tally, has there been a certain tariff or tariffs that have been filed by the Livestock Terminal Service Company, and if so, describe it?

A. There was filed with the Commission, effective August 10, 1941, tariff No. 1 of the Livestock Terminal Service Company. This tariff publishes a charge of $4.00 per deck for unloading, care, handling, and delivery to consignee, including storage for not more than twenty-four hours, of livestock consigned direct to packers at Cleveland, Ohio, and not offered for sale upon the public market. My information concerning this company is gained principally from appendices I, II, and III to the decision of the Commission of April 7, 1941 in Ex Parte No. 127, Status of Public Stock Yard Companies. I have reproduced those appendices for filing as exhibits in this case and offer them as my Exhibit No. 7.

I also offer in evidence a copy of the lease agreement between
336 the Cleveland Union Stock Yards Company and Livestock Terminal Service Company, dated May 31, 1941, which was offered as Exhibit 312 by Mr. A. Z. Baker, president of

the Cleveland Union Stock Yards Company, at the hearing in Ex Parte No. 127 at Cleveland, Ohio, November 3, 1941.

Q. That is your Exhibit 8?

A. That is my Exhibit No. 8; yes, sir.

Q. Please proceed.

A. I have with me a copy of Livestock Terminal Service Company tariff No. 1, but did not think it necessary to have it reproduced for introduction as an exhibit because it is in the files of the Commission.

Q. Well, now, do the line-haul defendants make any provisions, any tariff provisions, for absorbing the charges of the Livestock Terminal Service Company?

A. The railroad defendants herein make no provision in their published tariffs for the absorption of any unloading charge of the Livestock Terminal Service Company and publish an allowance to the Cleveland Union Stock Yards Company of only 90 cents per car for unloading of livestock at the facilities of the Cleveland Union Stock Yards Company. This appears from the following tariff provisions:

Item 490, page 71, of Agent B. T. Jones' tariff ICC No. 3587, effective August 15, 1941, appears under a caption entitled, "Allowance for loading and unloading livestock in carloads." It
337 states that where tariffs provide for the absorption of loading and unloading charges assessed by the stockyard companies the allowances to such stockyard companies will be as shown below. In item 490, under Cleveland, Ohio, it provides that an allowance is to be made to the Cleveland Union Stock Yards Company of 90 cents per car for loading and 90 cents per car for unloading carload shipments of livestock. The railroads making the allowance are listed as the Erie Railroad, New York Central Railroad, New York, Chicago & St. Louis Railroad, and Wheeling & Lake Erie Railway. It may be noted that the Pennsylvania Railroad apparently is not a part to this allowance. It may also be noted that this allowance is to the Cleveland Union Stock Yards Company and not to the Livestock Terminal Service Company, and also that the allowance is 90 cents per car while the charge published by the Livestock Terminal Service Company is $4.00 per deck, which is the same as saying $4.00 per single-deck car or $8.00 per double-deck car.

It is also to be noted that the tariff of the Livestock Terminal Service Company does not segregate the unloading charge from other charges, but lumps under the single charge of $4.00 per deck the services of unloading, care, handling, and delivery of livestock, including storage for not more than twenty-four hours. None of these services would be necessary if plant delivery were accorded to the Swift plant.

338 By Mr. FITZPATRICK:

Q. May I ask for a point of information, I don't know whether counsel should answer it or Mr. Tally. You don't contend that the provisions you referred to about unloading, or absence of a provision in the carrier's tariff, or for paying the charge by the Livestock Terminal Service Company is in point so far as traffic delivered to your plant is concerned, do you?

Mr. RYNDER. It is rather embarrassing—I think, strictly as a matter of law, as a tariff we probably owe that money to the Livestock Terminal Service Company.

Mr. FITZPATRICK. I was getting more directly at this. You don't contend that the trunk-line railroads should provide for the unloading of stock at your own plant, do you?

Mr. RYNDER. I contend they should place the car there for unloading by us.

Mr. FITZPATRICK. But not pay the Livestock Terminal Service Company for unloading?

Mr. RYNDER. That's right.

Mr. FITZPATRICK. I understand it; thank you.

By Mr. RYNDER:

Q. Up to date have you paid any charges to the Livestock Terminal Service Company?

A. No; we have not.

Q. Please state the facts in that connection.

A. It is true that up to date we have not paid to anyone the charge of $4.00 per deck made by the Livestock Terminal
339 Service Company. However, I have not been able to find any tariff authority for the absorption of that charge by the trunk-line railroads. I know that in three cases set for hearing yesterday, that is, No. 28400, No. 28421, and Sub. No. 1, the railroads are attempting to restrict their duty to unloading into proper pens, and, in No. 28421, and Sub. No. 1, are asking the Commission to require the Cleveland Union Stock Yards and the Livestock Terminal Service Company to refund to the railroads as reparation all amounts in excess of a reasonable allowance for the mere unloading of the livestock into suitable pens. As a result of this situation, a part of my concern about this case is that, since tariff No. 1 of the Livestock Terminal Service Company is a tariff of a common carrier by railroad filed with the Commission and since the absorption of its charges is not provided for in railroad tariffs, and if the Commission should decide that the railroads need not pay either the stockyards company or the service company more than 90 cents per car or some other amount less than $4.00 per car——

Q. $4.00 per deck?

A. Per deck, yes sir—the service company might in that event be able to collect from the Swift and Company the difference between its published charge and the absorption authorized by the Commission both upon past and future shipments. This would result solely from the refusal of the defendants in this
340 case to accord plant delivery of livestock to the Swift and Company plant, as requested in our Exhibit No. 4, because, in view of the facilities maintained by Swift at its plant for the specific purpose, namely, the receipt of livestock by rail, it is unnecessary for Swift to use the pens of the Cleveland Union Stock Yards or of the Livestock Terminal Service Company, or to call upon either of those companies for any services in connection with the unloading, care, handling, delivery, or storage of livestock consigned to the Swift plant at Cleveland. If we should ultimately have to bear this expense, its imposition upon us would be due solely to the refusal of the trunk-line defendants in this case to make deliveries of livestock at the plant facilities of Swift and Company.

Mr. Rynder. Mr. Examiner, that would conclude all of our direct testimony except this, that outside of the, or prior to the hearing, I had asked counsel for the New York Central Railroad to furnish for this record a copy of the original agreement between that company and the Cleveland Union Stock Yards Company for the use of the track discussed here. According to some of these exhibits and testimony, that is in agreement of June 16, 1924, although I am not certain about that date, and that it was modified in some way by a later agreement. Before closing our case in chief, I would like to make a request upon the record that that agreement be furnished for the record.

341 Mr. King. In line with your request, I have checked it over this morning and we have that agreement, one with the map and the one without the map which is already in Exhibit No. 1. The original agreement is underneath the supplement there.

Mr. Rynder. May we be off the record, please?

Exam. Carter. Off the record.

(Discussion was had outside the record.)

Exam. Carter. On the record.

Mr. Rynder. Mr. King has kindly handed me what purports to be an agreement of June 16, 1924, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the Cleveland Union Stock Yards Company, and a supplement to said agreement, effective as of February 1, 1935. I desire to offer those in evidence as Exhibit 9. I have only one copy for the record.

Exam. Carter. That is all right.

(Complainant's Exhibit No. 9, marked for identification.)

Mr. RYNDER. That is all of our direct testimony.

Exam. CARTER. Mr. Tally will be back in a minute for cross-examination.

Is there any cross-examination now of Mr. Tally?

Cross-examination by Mr. CONNELL:

Q. Mr. Tally in connection with your Exhibit No. 1, I understood you to say that Swift and Company has storage space
342 on this track for approximately eight cars of livestock?

A. Yes, sir.

Q. Can you point out on the map just where that would be?

A. No, Mr. Connell, because it is not shown. We show the location of Swift and Company, but included within that location are livestock pens that are adjacent to 65th Street.

Q. Well, as I understand the situation, the square that is outlined there and marked on the inside "Swift and Company" is your plant, your main plant?

A. Yes, sir.

Q. And that these direct shipments formerly were unloaded directly into that plant?

A. Yes, sir.

Q. Through one of the doors of the plant?

A. Yes, sir.

Q. Were there any pens located outside of the plant?

A. Not to my knowledge; no, sir.

Q. All of the storage pens were inside of the plant?

A. Within what is known as the Swift and Company plant and adjacent thereto, and I mean by that they have main buildings which is the packing-house plant, and adjacent to those are the stock pens.

Q. But you had to unload and did unload all of these direct shipments directly into the plant from the car?

A. From the car into these pens; yes, sir.

343 Q. Are you sure about that?

A. I know it; yes, sir.

Q. Where are the pens located with respect to the plant?

A. Well, to be more specific, the plant unloading facilities are on the back of the plant, which is West 63rd Street. Now, they are unloaded on a platform which is a part of the plant, including the structure and so forth, and from that unloading facility they are then driven into pens that are located alongside of our plant.

Q. Which direction from the plant are these outside pens?

A. Well, let me see——

Q. I was under the impression that there was no platform between the tracks on which the livestock was placed and the plant. The stock was driven directly from the car into the plant. I may be wrong on that.

A. Mr. Connell, I should like to, if I may be permitted to, show you a picture that was taken of the unloading facilities of the Swift and Company plant through which livestock, or where livestock may be unloaded from the cars into that location as shown on that picture and they are driven into livestock pens as are depicted in these pictures which I now hand you.

Q. That confirms my impression that there was no platform between the track and your plant and that it was delivered direct from the car into your plant and then perhaps driven
344 from your plant into these outside pens.

A. You are wrong about that.

Q. The photograph shows——

A. That is part of the plant; those are driven into a pen which is alongside of our plant and a part of our plant.

Q. I don't see any platform on this photograph. Perhaps if you show me——

Mr. CONNELL. Perhaps Mr. Baker can clear it up.

Mr. BAKER. That is one question I can't answer.

The WITNESS. There is a foundation where livestock can put their feet.

By Mr. CONNELL:

Q. I think that is just a timber alongside of your plant?

A. I don't find any. I know that is foundation upon which livestock can rest their feet when they are driven from the car onto that foundation and from there driven into our plant. And, Mr. Connell, for your information that was done for many years prior to the time you refused to deliver livestock.

Q. I never refused, personally. I was out to the plant and I didn't see any platform and I don't think that that photograph indicates that platform. Regardless of that, you didn't mean to say that eight cars of livestock could be placed on the Swift property and all unloaded without respotting?

A. No—one location——

Q. Only facilities for one car at a time?

345 A. Yes; just the same as a car of salt or a car of boxes, or a car of meat.

By Mr. KING:

Q. These pens, Mr. Tally, are located between the old packing plant and 65th Street, aren't they?

A. Yes; the back end of the packing plant and 65th Street.

By Mr. CONNELL:

Q. Well, which direction of the plant on this map No. 1 would it be; south between the plant and the track?

A. Well, it would be west of the unloading facility.

Q. Between the plant and 65th Street?

A. Yes; between the plant and 65th Street would be west.

By Mr. RYNDER:

Q. Mr. Tally, just to get that straight on this map, those pens according to the directions on this map are south of the spot marked "Swift and Company"?

A. Yes, sir.

Mr. CONNELL. He said they were west.

Mr. RYNDER. I thought he made a mistake.

A. I thought you meant where our facilities were. It is west of where we unload livestock.

By Mr. CONNELL:

Q. You unload the livestock, as I understand, into the southeast corner of this square building that is marked "Swift and Company"?

A. Well, someplace—I wouldn't try to identify it exactly.

Exam. CARTER. The southwest corner or the southeast corner; which corner are you talking about?

346 Mr. CONNELL. This is north and it would be the southeast corner [indicating].

Exam. CARTER. Wait a minute; you have it turned around.

Mr. CONNELL. This is north [indicating].

Exam. CARTER. I know it is.

Mr. CONNELL. That being north, the way I have my finger would be the southeast corner [indicating].

The WITNESS. It would be the east end of the plant.

By Mr. CONNELL:

Q. South and east end of the plant?

A. You have it your way, but east is right to the north to me.

Q. I am trying to get it straight. I was out there and looked it over, and it was a very hot day, and I'm not sure my recollections are correct.

Exam. CARTER. Now, gentlemen, the record is in a rather confused state on this point so that I would like to get it straightened out.

Mr. CONNELL. I would too. I wonder if somebody around here——.

Mr. HEINEMANN. How about Mr. Turner?

Mr. FITZPATRICK. Without regard to directions, south and east and so forth, I wonder if the witness can point it out precisely where it is with regard to other outlets adjoining the Swift and Company?

Exam. CARTER. I think that would be better.

By Exam. CARTER:

Q. Which corner does the car go in?

347 A. Wait a minute——

By Mr. RYNDER:

Q. Mr. Tally, you see some tracks across the land marked "Swift and Company"?

A. Yes, sir.

Q. Then, you see a square marked "Swift and Company"?

A. Yes, sir.

Q. Now, where are these unloading pens with respect to these two objects?

A. The unloading pens are between the marks that enclose the name "Swift and Company."

By Mr. CONNELL:

Q. What do you mean by that?

A. Well, there are two lines that identifies Swift and Company by a westerly direction, one on the south side of "S" meaning Swift and Company, and the other on the north side of "O" meaning Swift and Company.

Q. You mean the lines between 63rd Street and 65th Street?

A. The unloading pens are east of the name "Swift and Company" on the track purported to serve Swift and Company, east of the name "Swift and Company."

Q. Well, now, you say the unloading plant. I understood you to say a moment ago that the unloading facility you had was this one door which opened into your plant and these unloading pens are really storage pens?

A. I will call it unloading facilities from which they are driven into livestock pens.

348 Q. Now, this photograph that you handed me of the plant door where you unload, you have unloaded livestock, isn't that door used for other purposes than unloading livestock?

A. Probably; yes, sir.

Q. You don't know exactly what it might be used for?

A. No.

Q. Do you know whether it is used for unloading livestock or other freight from trucks?

A. It is not used for unloading livestock. We don't get a chance to unload the livestock there.

Q. From trucks?

A. The trucks wouldn't unload there; they can't back up because of the rails.

Q. Are you sure that is not a cement platform there?

A. I know the rails are adjacent to the platform, and while they may be used, assuming what you are claiming, still there is unloading facilities for——

Q. Where do you unload the truck livestock?

A. Rather than have me guess——

Q. I don't want a guess.

A. Mr. Hurley, who is our local transportation man, he is here and he can give you all the actual facts if you rather have him.

Q. Let us have him, because we are not agreed on it at all. Now, in connection with this Exhibit No. 1 again, you
349 mentioned three other packing houses here, the Long Dressed Beef Company, The Cleveland Provision Company and the Ohio Dressed Beef Company, is it?

A. As I indicated——

Exam. CARTER. Ohio Provision Company.

By Mr. CONNELL:

Q. Now, where are those three concerns located on this Exhibit No. 1?

A. Well, as I understand their location is southwest of Clark Street on the main line of the New York Central Railroad.

Q. Southwest of Clark Street?

A. Yes, sir.

Q. That would be to the right-hand side of your Exhibit 1?

A. No; that would be the left of my Exhibit No. 1.

Q. Right.

A. Well, I have it in front of me right here.

Q. I have, too. Here is where I understood you to say it would be [indicating].

A. Well, here is north—this must be south [indicating].

Q. Where are they located?

A. I would call them within this triangle [indicating].

Q. That is the right-hand side of the exhibit. Don't put this on the record until we get it clear.

Exam. CARTER. Off the record.

(Discussion was had outside the record.)

Exam. CARTER. On the record. Well, wouldn't this be
350 correct: That they are located in the triangle at the lower right-hand side of the exhibit in which a designation of "Tower" appears, or at least a designation of "Tower" appears in the triangle. Is this where you mean [indicating]?

Mr. BAKER. Are you off the record?

Exam. CARTER. No; we are on the record.

Mr. BAKER. That's not right.

Exam. CARTER. Off the record.

(Discussion was had outside the record.)

Exam. CARTER. On the record.

By Mr. CONNELL:

Q. As I understand it, you don't know whether these three companies that I mentioned are served by the same track that you described in connection with your shipments?

A. I have a definite recollection that they are served by the New York Central Railroad, but not the same track that reaches our plant.

Q. That is, they don't have to use this particular track that is owned by the Cleveland Union Stock Yards?

A. I don't know anything about it. I know that they don't have to switch the car over the same track as reaches our plant as they do to get to their plant.

By Mr. FITZPATRICK:

Q. May I ask a question, please. Mr. Tally, I think that I understood your explanation as to the effect of the tariffs
351 shown in supplement 3, but may I state it this way——

A. Exhibit 3 you mean?

Q. Exhibit 3. Your point is that if that tariff had any effect at all, it applied merely to traffic which was line hauled by the New York Central Railroad into Cleveland?

A. No; my point is this: That Exhibit No. 2 provided a switching charge between points of interchange with the railroads shown at the top of Exhibit 2, and Swift and Company and the other industries located therein, and that that charge is absorbed by those railroads in reaching Swift and Company's plant. Now, Exhibit No. 3 eliminates the identity of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company as a separate corporation and makes it the New York Central Railroad so that industries formerly of the Cleveland, Cincinnati, Chicago and St. Louis Railway became industries of the New York Central Railroad, and that rates published to Cleveland, Ohio, included deliveries to industries on the New York Central Railroad, and no switching charge is involved.

Q. But isn't that, though, only traffic which is line hauled by the New York Central Railroad?

A. Yes.

Q. In other words, you agree with me, do you not, from and after the date in November of 1938, when the switching charge was restricted, so that it would not apply on livestock, that from
and after the date of that restriction there was no
352 switching charge which the Nickel Plate, Pennsylvania Railroad or the Baltimore & Ohio Railroad could absorb and reach your plant?

A. That's right.

Q. I got the impression from your testimony in regard to your Exhibits 4 and 6, that there was some change in the method of preparing bills of lading at or about the latter part of 1941. Am I correct in that?

A. No—no change in the bills of lading except that we routed our traffic differently and requested that the plant delivery be made on livestock.

Q. Well, let us refer to Exhibit 6. Now, as to shipments early in 1941, or during 1940, it wasn't the practice to consign shipments to Swift and Company's plant delivery, was it?

A. No, sir.

Q. How were shipments as of that period consigned?

A. I would say generally, "Swift and Company, Cleveland, Ohio."

Q. And they were delivered to you through the Stock Yard property?

A. Yes, sir.

Mr. FITZPATRICK. That is all I have.

By Mr. HEINEMANN:

Q. I have a few questions that I want to clarify the Livestock Terminal Service Company's end of this. In your reference to our tariff ICC No. 1——

353 The WITNESS. May we have a recess for about five minutes, please?

Exam. CARTER. Yes.

Mr. HEINEMANN. Surely.

Exam. CARTER. We will take a short recess, gentlemen.

(Recess had.)

Exam. CARTER. Any other questions of Mr. Tally?

By Mr. HEINEMANN:

Q. Mr. Tally, in referring to the tariff of the Livestock Terminal Service Company, do you agree with me that there is no indication that those charges must be collected from the line-haul carriers?

A. Nothing in that tariff to indicate that it has to be collected from other than those who used it.

Q. Does it differ in any respect with the other stockyard's loading and unloading tariffs?

A. Well, it is different.

Q. I mean, in that one respect?

A. It provides a charge in connection with the line-haul movement of livestock, for delivery of livestock.

Q. With respect to that complaint, and to your references to certain provisions in there, and to your exhibit which sets forth our lease agreement with the Cleveland Union Stock Yards Company, do you agree with me that so far as the Terminal is concerned, we have nothing whatever to do with the track that serves your company, or the property over which that track runs,
354 or the ownership of the track?

A. Yes, sir.

Q. I might have misunderstood you, and if I did, I won't pursue the question. I thought you said, or at least implied that Cleveland is the only place in the United States where you could not deliver livestock to your plant, the same as you did to the other places?

A. I think that is a correct statement, Mr. Heinemann, for this reason, so far as other than the New York Central Railroad is concerned, there is no charge, nor rate for the movement of livestock from, and interchange with the Nickel Plate, for example, to the Swift and Company. At other places in the United States direct delivery may be made at a charge, whatever that may be, it doesn't make any difference—it might be five dollars or twenty-five dollars.

Q. There are plants of Swift and Company where the charge would be more than if the stock went through the stockyards; isn't that true; for instance, at Chicago?

A. Well, if we are going to measure the charge, I will say that I don't know, without check of the yardage charge against the switching charge, but there is a place to come out into our plant at a charge when it comes via all railroads who use Chicago as an example.

Q. As a matter of fact, isn't the majority of Swift and Company livestock delivered through the facilities of public
355 stockyards rather than direct to your plants and by that I measure the volume and not the plants?

A. No; that is wrong; we probably do not receive five cars a year through the Chicago plant, because it comes through another facility. At Kansas City we get them direct at our plant. I wouldn't venture to say what we do at all our plants, because we have a lot of them, without checking into them. It is possible to receive at our plant any place in the United States, except Cleveland, Ohio, outside of my interpretation of the tariff, so far as the New York Central is concerned, and other railroads serving Cleveland other than the New York Central, there is no rate from the interchange, for example the Nickel Plate Railroad to the Swift and Company plant.

Q. Getting the cases, for example, how many of your livestock to Sioux City is for unloading?

Mr. RYNDER. I object to that; that is not relevant to any issue.

Mr. HEINEMANN. Mr. Examiner, the witness made the statement that this is the only place in the United States where the condition existed which caused them to get their shipments through the stockyards or terminal facilities.

Mr. RYNDER. No; I don't think we ever said that.

Mr. HEINEMANN. I so undertsood it. If I am wrong, I wish the witness to correct me.

356 A. I think I stated, Mr. Heinemann, that at every other place in the United States we have a charge for direct delivery of livestock to our plant, except Cleveland, when the livestock comes in on railroads other than the New York Central Railroad; may be fifty dollars or five dollars, but they still have a way of getting it in there.

By Mr. HEINEMANN:

Q. You don't mean to apply it to all the other points the railroads effect its delivery on a line-haul rate?

A. It may be additional.

Q. As a matter of fact, it is additional at a great many of those points, is it not?

A. Yes, sir; that would apply to Chicago.

Q. I think you said, to——

By Mr. RYNDER:

Q. Let me see; are you covering all of Chicago in one breath?

A. I mean Chicago—Swift and Company's plant at Chicago identified as within the Union Stock Yards, not including the Omaha Packing Company.

Q. You don't pay a rate to have your Omaha Packing Company delivered.

A. No, sir; that is absorbed by the railroads.

By Mr. HEINEMANN:

Q. But that does cost you money to move it from the Omaha down to your plant?

A. That is outside of the railroad transportation, yes.

357 Q. I think you had said that you never had paid charges to the Livestock Terminal Service Company, and I would like to ask you if you hadn't paid where you exceed the storage limits, our bills for storage?

A. I don't know that; I suppose our local man would know; that is something beyond the mere transportation of livestock.

Q. But it is covered by our tariff.

A. I assume so, or you couldn't collect it.

Mr. HEINEMANN. I think that is all, Mr. Examiner.

Exam. CARTER. Any other questions?

Mr. BAKER. No questions.

By Mr. CONNELL:

Q. I have just one question before you leave. When you said that you had a storage space there for eight cars, you meant pen storage space rather than track storage?

A. Yes.

Q. You mean eight single deck or eight double deck?

A. I would prefer to have Mr. Hurley answer, if I might.

Mr. CONNELL. That is all.

Exam. CARTER. Any other questions? (No response.)

Mr. Rynder, do you have any more?

Mr. RYNDER. No further questions.

Exam. CARTER. That is all; you are excused. (Witness excused.)

Mr. RYNDER. I would like to call Mr. Hurley.

J. H. HURLEY was sworn and testified as follows:

358 Direct Examination by Mr. RYNDER:

Q. State your name please.

A. The name is J. H. Hurley.

Q. Mr. Hurley, please state your position.

A. I have charge of the transportation department of Swift and Company in Cleveland, Ohio.

Q. Mr. Hurley—if the Examiner will be kind enough to let you do so, look at Exhibit 1. You were present and heard the discussion of the location of some pens adjacent to the Swift track, which would hold approximately eight carloads of livestock?

A. Yes.

Q. Will you please, on Exhibit 1 place an "X" showing the location of the said eight pens?

Exam. CARTER. You want him to do it with pencil so that we can rub it out?

Mr. RYNDER. With pencil.

Exam. CARTER. He is using a pen.

By Mr. RYNDER:

Q. And before you put it down, get it right. My impression was it was right here [indicating].

A. Just a minute please.

Q. Isn't this 65th Street [indicating]?

A. Yes.

Q. Aren't the pens here where my finger is [indicating]?

A. This, I assume is the building. I haven't gone over
359 these. The pens are located just about right here; just about there.

Q. Well, then answer my question: Put an "X" mark in pencil showing the location of said eight pens?

A. Yes, sir [marking exhibit].

Mr. Rynder. Now, if any other gentlemen want to get that on their exhibit, please note where it is.

By Mr. Rynder:

Q. Now, there has been some discussion here about the place at which the car is spotted for unloading livestock so that the contents of the car can be driven into the pens. Will you please, in a similar manner, mark on Exhibit 1 in pencil the approximate location of that unloading pen and mark it with the letter "Y"?

A. Letter "Y"?

Q. Yes.

A. All right, sir [marking exhibit].

Q. Now, there was some question asked as to where you have unloading facilities, if any, for the receipt of livestock by truck. I ask you on Exhibit 1 to mark such facility, if any, by the letter "Z".

A. All right, sir [marking exhibit].

Q. Now, there were some questions as to the approximate location on this map of the plants of the Cleveland Provision Company, the Ohio Provision Company, the Long Dressed Beef Company. Will you please mark on Exhibit 1 with the letter "A" the approximate location of those three plants?

360 A. Yes sir. The letter "A"?

Q. The letter "A".

A. That is the Cleveland Provision [indicating].

Q. Well, then, what does the letter "A" represent?

A. The Cleveland Provision.

Q. Which one will you mark next?

A. The Ohio.

Q. Mark it with the letter "B".

A. All right [marking exhibit].

Q. Will you please mark with the letter "C" the approximate location of the Long Dressed Beef Company?

A. They are right about in here; just about along in here.

Mr. Rynder. Please let us state for the record that the letter "A" represents the location of what?

A. The Cleveland Provision Company.

By Mr. Rynder:

Q. The letter "B" represents the location of what?

A. Ohio Provision.

Q. The letter "C" represents the location of what?

A. The Long Dressed Beef Company.

Mr. RYNDER. Now, Mr. Examiner, since the location of unloading facilities, pens, and three packing companies have been marked on Exhibit 1 by letters, the meaning of which are located in the record and I would like to have it understood that we
361 may disregard the prior testimony regarding the points of the parties.

Exam. CARTER. I think that is satisfactory by everybody and desired.

Mr. RYNDER. Thank you. That is all I have.

Exam. CARTER. You may cross-examine.

Cross-examination by Mr. CONNELL:

Q. Mr. Hurley, will you state just what these pens consist of?

A. Well, the pens are just similar to the pens in the Cleveland stockyards.

Q. They are outside pens?

A. No, sir; they are covered pens; covered pens, except just a small portion of about three of the pens are practically uncovered, but the others are all covered pens.

Q. What I meant was that you have some storage space in your plant?

A. Well, the pens are located on Swift and Company's property, but they are not in the plant.

Q. Well, as I understand it, you unload the livestock, or you did, from the car at this point "Y" directly into your plant?

A. It goes through a portion of the building which we term a runway.

Q. And then out into these pens?

A. Into the alleys and right into the pens; yes, sir.

Q. What sort of unloading facility do you have there;
362 was there a platform behind the building in the back?

A. It is a brick building and the door is considerably larger than a car door. Of course, we simply put down a steel platform or a wooden platform. We have used them both, with sides on them, and the distance between the car and the building is the legal distance allowed by law, and they run right through that into this concrete runway, into the alleys and the pens.

Q. There is no permanent platform between your building and the tracks?

A. Oh, no; this is a concrete runway—it is what we term the runway.

Q. That is inside your brick wall?

A. Inside; yes.

Q. Outside of your building and crossing the track there is a concrete roadway, isn't there?

A. You mean after the livestock leaves the car?

Q. I am not speaking of the cattle at all. I am speaking of outside of your building there is a concrete driveway that crosses the track that serves your building.

A. That concrete driveway, there is one there, and one a little farther north of that. We sometimes unload trucks there, but not livestock. We use it for other purposes, but not truckloads of livestock.

Q. Now, approximately how much storage space do you have there at the plant; square feet?

363 A. We have what?

Q. Square feet.

A. We gave that to Mr. Tally. I don't have it in feet. I can tell you the number of pens. We have eight pens. We can take care of eight carload of eight double decks.

Q. You have sufficient storage space for eight double decks?

A. That is correct; yes, sir.

Q. At the time when you were receiving direct shipments at your plant, you were also receiving some shipments through the Cleveland Union Stock Yards, weren't you?

A. As I recall; yes, sir.

Q. How long have you been located here at Cleveland?

A. About seventeen years.

Q. About seventeen years. Well, taking the year 1934, for example, I wonder if you could tell us approximately how the shipments received direct at your plant compared with the shipments received through the Cleveland Union Stock Yards.

A. I couldn't answer that offhand.

Q. I have before me here Exhibit No. 18, which was offered in evidence in Docket No. 28400, which shows that in 1934 Swift and Company received direct at its plant over the New York Central Railroad and the Big Four, three hundred and forty cars, and through the Cleveland Union Stock Yards, one hundred nineteen cars, and by the Nickel Plate direct to its plant, three hundred ten cars, and through the Cleveland Union Stock

364 Yards, seventy-four cars; via the Pennsylvania direct; thirty-three cars; and through the Cleveland Union Stock Yards, fifty-nine cars; via the Baltimore and Ohio Railroad, two cars direct; and through the Cleveland Union Stock Yard, one car; and via the Erie Railroad, four cars direct; and none through the Cleveland Union Stock Yards. Is it your recollection that that was about the correct proportion which they received?

A. As I say, I couldn't tell you because I had no reason to keep up with those figures. The unloading is handled by the superintendent. I pay no attention to the unloading whatever.

Q. How many carloads of your livestock does your company slaughter per day here?

A. That varies; I couldn't answer that because that is a matter our superintendent would have to answer. I am the transportation man. As far as the slaughtering, I couldn't answer that.

Q. You don't know, approximately?

A. No, sir.

Q. What the maximum cars would be?

A. No; I don't.

Q. Are you familiar with the in-bound shipments by truck as well as by rail?

A. Yes; so far as the routing and who handles them, and so forth, yes.

365 Q. How about the proportion you received by truck versus by rail; can you tell us that?

Exam. CARTER. What is the purpose of that examination, Mr. Connell?

Mr. CONNELL. I was trying to find out how this storage space would take care of all their in-bound traffic.

Mr. RYNDER. I am not contending that it would.

Mr. CONNELL. Well, what is your position on that, Mr. Rynder?

Mr. RYNDER. I am contending that it would take care of eight cars at one time.

Mr. CONNELL. And that, if you were permitted direct delivery, that you would ship all of your direct shipments by rail direct to your plant?

Mr. RYNDER. We certainly wouldn't if we had thirty cars coming in at one time, and on the other hand, we would if we had seven.

Mr. CONNELL. You admit that under usual working conditions, that you would have to use the facilities of the Cleveland Union Stock Yards at the time?

Mr. RYNDER. I would not.

Mr. CONNELL. You wouldn't admit that?

Mr. RYNDER. No; but I admit that if we had eight cars to unload at a certain moment, we would have to do something with those pens, and we have a right to do so. If we have

366 ten carloads of cattle, we can't get them unloaded at one time.

By Mr. CONNELL:

Q. Mr. Hurley, what would you do with the stock in excess of eight cars?

A. Well, that would depend on how much time we had. I would say according to law, the thirty-six-hour limit.

Q. Where would you start? You only have storage space for eight cars; where would you start?

A. I assume no other place but the Union Stock Yard.

Q. Are you using the stockyard for livestock now?
A. We have twenty-four hours free time.
Q. Free time?
A. Twenty-four hours free time.
Q. I didn't know that there was anything free around here.
A. Is that right, Mr. Baker?
Q. Mr. Baker says that's right.
A. After that time, of course, if we hold them longer than that, we are supposed to, we have to pay according to the tariff charges.
Q. Do you have tariff charges for bringing livestock over to the stockyards?
A. No, sir; that is up to the superintendent.
Q. You don't know how long it is left over there?
A. No, sir.

By Mr. FITZPATRICK:

Q. These eight pens that you referred to, what are they
367 used for since the stock is not delivered by the railroads?
A. As a usual thing we would bring stock over from the stockyard and put them in those pens, so that we wouldn't be assessed for charges for holding over the length of time. In other words, we hold them there instead of at the stockyards.
Q. Some of the shipments that you receive at your plant, do they find their way into those pens?
A. Yes, sir. I marked on this exhibit where the trucks unload, and they go into the same alleys and the same pens as stock arriving in cars, but it is received at a different entrance.
Mr. FITZPATRICK. That is all. Thank you.
Exam. CARTER. Any other questions?
Mr. CONNELL. Mr. Rynder, you don't contend that any track of the Cleveland Union Stock Yard is used in delivering livestock to the Long Dressed Beef Company, the Cleveland Provision Company or the Ohio Provision Company.
Mr. RYNDER. I made no contention on that.
Mr. CONNELL. Well, will you admit they are making deliveries to those plants, that no track of the Cleveland Union Stock Yard is used?
Mr. RYNDER. I believe that to be a fact.

By Mr. CONNELL:

Q. That is a fact, Mr. Hurley, isn't it?
A. Yes, sir; because they are located on the main line of the New York Central Railroad, as I understand it.
Exam. CARTER. Any other questions? (No response.)
368 That will be all, Mr. Hurley; you are excused.
(Witness excused.)

We will recess this case for a short period.

(Recess had.)

Exam. CARTER. We will go back on the record with Docket No. 28714.

Stipulations as to certain facts

Mr. RYNDER. I believe Mr. King wanted me to stipulate the facts, which I am willing to do.

Mr. KING. Do you want me to state them?

Mr. RYNDER. You may state them.

Mr. KING. We ask Mr. Rynder to stipulate that track shown on Exhibit No. 1 in this Docket No. 28714 and referred to as 245 N. Y. C.—N. Y. C. No. 26A or Local No. 10 south of the right-of-way of the New York Central Railroad Company is located entirely on land owned by the Cleveland Union Stock Yards Company, and the 1,619 feet of said track extending south from the southerly right-of-way line of the New York Central Railroad Company is owned by the Cleveland Union Stock Yards Company. The Cleveland Union Stock Yards Company does not operate said track. The track is operated by the New York Central Railroad Company for the transportation of all commodities other than livestock. No direct livestock is carried over said track.

And the second one is: That the plants of the Ohio Provision Company and Long Dressed Beef Company, which
369 are located on the north and west sides of the main track of the Big Four opposite the stockyards are not served by any of the tracks of the Cleveland Union Stock Yards Company nor is the track of the Cleveland Provision Company, which is on the east side or south side of the track of the Big Four; that is to say, the tracks of the Cleveland Union Stock Yards Company are not involved in serving either of those packing plants.

Mr. RYNDER. Well, I believe the statement by Mr. King is correct and I am willing to stipulate that it may be accepted as the facts for the purpose of deciding this case.

Mr. KING. There is another matter there that I might speak to Mr. Baker about, first.

Mr. RYNDER. Mr. Examiner, I desire to offer in evidence the exhibits heretofore marked for identification Nos. 1 to 9, inclusive.

Exam. CARTER. Any objection?

Mr. HEINEMANN. None whatever here.

Exam. CARTER. They will be received in evidence.

(Complainant's Exhibits 1 to 9, inclusive, Witness Tally, received in evidence.)

I don't have the amount that the Cleveland Union Stock Yards Company is asking the railroads for the use of that track to haul livestock over it. We might supply that amount which is shown

in Mr. Baker's letter to the railroads which was based on the yardage charges applicable to direct stock as contained in
370 the Cleveland Union Stock Yards Agricultural Tariff No. 5.

Exam. CARTER. Filed with the Secretary of Agriculture?

Mr. KING. Yes. Filed with the Secretary of Agriculture. I will be glad to supply the amount and indicate that the failure to use the track for livestock is due to the fact that the New York Central could not see its way clear to pay for the privilege what the Cleveland Union Stock Yards is seeking to collect from the railroads. Those are fixed in the letter from the Cleveland Union Stock Yards to the New York Central Railroad.

Mr. RYNDER. I don't have any objection to those letters being filed later.

Mr. BAKER. You want the rate or charge?

Mr. KING. The rate.

Mr. BAKER. The rates I can give you. They are as follows: It was twenty cents a head on cattle. Twelve and a half cents a head on calves; seven and a half cents a head on hogs; and five cents a head on sheep.

Exam. CARTER. You are willing to stipulate that, are you, Mr. Rynder?

Mr. RYNDER. Yes.

Exam. CARTER. With those stipulations, do I understand that the defendants do not desire to offer any testimony other than already has been put into this record?

Mr. KING. As I understand, as far as the New York
371 Central Railroad is concerned, we are satisfied to stop where we are on the introduction of evidence.

Exam. CARTER. Does that apply also to all the other defendants?

Mr. BAKER. So far as the stockyards is concerned, the record should show—I think you included that, Mr. King?

Mr. KING. That's right.

Mr. HEINEMANN. I think, Mr. Rynder, in our discussion over there, was in accord with the stipulation he was able to enter into—to get rid of our ten cents worth—if Mr. Rynder will be good enough to suggest that.

Mr. RYNDER. I understand Mr. Heinemann to construe the complaint in Docket 28714 as directly attacking the reasonableness of the charges of the Livestock Terminal Service Company for shipments which used the facilities of the Livestock Terminal Service Company. I had not intended our complaint to be so construed. My contention as to that is, for an illustration, if we should have to pay three dollars out of the four-dollar charge of the Livestock Terminal Service Company for service through its facilities on shipments which we have consigned to our plant, and upon which we desire plant delivery, that that arose through a

direct action of the railroads as refusing us delivery as we were asking against the line-haul railroads. I hope I made myself clear on that.

Exam. Carter. I understand your complaint to be to that
372 effect.

Mr. Heinemann. If Mr. Rynder is willing to stipulate to the——

Mr. Rynder. I am willing to state here that I am not seeking reparation against the Livestock Terminal Service Company.

Mr. Baker. Or the Stock Yards Company.

Mr. Rynder. For livestock handled through their facilities, but that if we incurred charges there by reason of the refusal of the line-haul defendants to make a delivery to our plant, we are seeking such damages as may be incurred by reason of what we consider the wrongful refusal of the line-haul defendants to make delivery to our plants, thereby causing us to incur the published charges of the Livestock Terminal Service Company.

Mr. Heinemann. That is quite acceptable to us, Mr. Examiner.

Exam. Carter. Anything further?

Mr. King. May I submit that I was more or less mixed up in my statement of the matter? It is just a matter of editing, to see if I stated what I stated.

Exam. Carter. You mean in connection with your stipulation?

Mr. King. Yes.

Exam. Carter. Could you write that stipulation out, Mr. Reporter?

373 The Reporter. Yes.

Exam. Carter. You can correct it then, Mr. King, and submit it to Mr. Rynder for his approval.

Mr. King. I will do that.

Exam. Carter. Do you gentlemen want a proposed report in this case, No. 28714? I suppose you do.

Mr. Rynder. I would like to have one, and I would like to have a reasonable time in which to file a brief.

Mr. King. That is satisfactory to us.

Exam. Carter. June 1, will that give you plenty of time?

Mr. Rynder. I think so.

Exam. Carter. Briefs in Docket No. 28714 will be due on June 1, 1942.

Is there anything further before the Commission in this proceeding? (No response.)

If not, the hearing is closed.

(Hearing was concluded at 5:15 o'clock P. M.)

375 Before the Interstate Commerce Commission

Docket No. 28714

SWIFT & COMPANY, COMPLAINANT

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., DEFENDANTS

CLEVELAND HOTEL,
Cleveland, Ohio, Thursday, June 22, 1944.

Met pursuant to notice at 9:30 o'clock a. m. E. W. T.

Before T. LEO HADEN, Examiner, Interstate Commerce Commission.

Appearances: As heretofore noted.

Additional appearance: M. S. Farmer, 802 Engineers Building, Cleveland, Ohio, appearing in behalf of the Cleveland Union Stock Yards Company, Defendant.

379 PROCEEDINGS

Exam. HADEN. Come to order please, gentlemen.

The Interstate Commerce Commission has set for further hearing at this time and place, Docket No. 28714, Swift & Company versus the Baltimore & Ohio Railroad Company, et al.

The parties will state their appearances and in doing so please indicate whether all who enter appearances are actually present at this hearing, and if written appearances haven't already been filed, they may be filed at this time.

For the Complainants?

Mr. RYNDER. R. D. Rynder.

Exam. HADEN. For the Defendants.

Mr. PIERCE. For the New York Central Railroad there is of record W. N. King and D. P. Connel, both of whom are not present today, but they have been here previously; and R. R. Pierce, on behalf of the New York Central.

Mr. FITZPATRICK. Kemper A. Dobbins and John J. Fitzpatrick for the N. Y. C. & St. L. Railroad company; both being present.

Exam. HADEN. Any other appearances?

Mr. FARMER. A. Z. Baker and M. S. Farmer for the Cleveland Union Stock Yards Company, both present.

Exam. HADEN. Are there any further appearances to be entered (No response.)

There is no free copy of the record in this proceed-
380 ing furnished by the Commission. Parties desiring copies of the transcript should place their order with the reporter.

The prior hearing in this proceeding was held some two years

ago. A proposed report was issued by Examiner Carter and served upon the parties on April 1, 1943. An oral argument was had before the entire Commission on June 4, 1943. By order of the Commission of June 14, 1943, No. 28714 and Ex Parte 127; Status of Public Stock Yards Companies were reopened for further hearing and further consideration. As I have just stated, Docket No. 28714 has been assigned for further hearing at this time and place.

The parties, among other things, will be expected to produce evidence bearing upon the questions raised at the oral argument in this proceeding.

The Complainant may call their first witness.

Mr. FITZPATRICK. Mr. Examiner, may I be clear on this? As I understand your statement, the only evidence to be received here is that in Docket No. 28714.

Exam. HADEN. That is correct.

Mr. FITZPATRICK. Thank you, sir.

Mr. RYNDER. Mr. Examiner, I would like to say a word in explanation: That following the Commission's statement for further hearing, I went over the oral argument and I made a memorandum of what question I thought were asked that could be answered factually and not just a legal conclusion. I furnished a copy of that to Mr. Pierce.

381 Page 102 of that argument, Mr. Pierce said in response to a question from one of the Commissioners: "There are industries over there; there is one coal company over there and there are about five or six industries that are served." We are prepared to show what those industries are, and I believe they agree with the list that Mr. Pierce has.

Now, there was a question as to when the original track serving the present Swift plant was put in and under what conditions. I haven't been able to find the answer to that and I am very doubtful as to whether Mr. Pierce has. We can show by our witness that we bought that plant from a predecessor company in, I believe, January 1905, and as we understand it, the track crossing 65th Street—anyway, the track leading from the then Big Four tracks on the stockyards side of the street across 65th Street into the plant which we purchased at that year, to the best of my knowledge and belief was in there when we purchased it, and we haven't been able to find any agreement as to the building of that original track connection for the conditions under which it was to be operated, although certain later agreements were made as to certain extensions of that track. I believe Mr. Pierce probably has those too.

Then question on page 109 of the oral argument, Mr. Pierce said, "This whole thing around the stockyards—industry has

grown up and all these relations between the railroads and the stockyards have been gone into in Docket 28421." As
382 to that, I made a suggestion prior to the hearing that we could stipulate in, to be treated as facts, either the decision of the Commission in that case or any part of the record, and I believe that one or another of these suggestions is agreeable to Mr. Pierce. I will leave him state what he desires to do about that.

As to any tariff arrangements dealing with this track, so far as they may have dealt with, they were shown on the former hearing by Exhibit 3 and certain later exhibits. We have made an investigation of the railroad tariffs, which so far as the tariffs show anything concerning it, goes back to 1904 prior to the purchase of our plant.

That in a brief way is the statement, and I am not sure about Mr. Pierce, that he has some matters which he would like to say and put in before we go ahead.

Mr. PIERCE. I believe that is right. If the Examiner please, we have made an extensive search for all records pertaining to the early history of the Swift & Company's track at that time, which I understand in 1905 was the Peoples Packing Company, or Peoples Provision Company, and also a part of that track now embraces what was at that time the Federal Packing Company and the Federal Packing Company was acquired by Swift & Company. I will have to ask Mr. Rynder to supply that.

Mr. RYNDER. 1930.

383 Mr. PIERCE. 1930. Back in the early stages, the Big Four Railroad, of course, owned and operated the property extending out of Cleveland towards the southwest to Cincinnati, and in 1930 the New York Central took that over as lessee and operated it.

In trying to locate some of the files, Mr. Cobb of our Land Department went to Cincinnati and Springfield, Ohio, and inquired around all of our offices in Cleveland and communicated with the traffic department of Chicago which in the early days handled the Big Four matters.

We have uncovered a number of agreements and one file of correspondence which we were able to locate in the last three or four days; so, we had in mind offering in evidence all the side-track agreements which are involved with industries, being stockyards track No. 10 and any history in our possession in connection with that track, and also the early history of the transactions with Swift & Company as far as we could get those facts.

Some of the records of the Big Four, which were stored at Cincinnati were destroyed in the flood of 1937, so, we are bringing

in, proposing to bring in here, all the records which we have been able to find.

With reference to Docket No. 28421, it is our thought that we might stipulate the Commission's findings, which, as they may be relevant to the evidence here, ought to be introduced
384 in evidence here as an exhibit in this case. As I say, some parts of that are not relevant to the argument here, but we think that the entire findings might be introduced subject to their relevancy in the controversy here.

Mr. RYNDER. Just before you leave that, since that is brought up, couldn't we stipulate as either party will agree to the Commission treating as a fact in this case any evidence found in the decision of that case?

Exam. HADEN. Yes. You will make a formal offer on that in connection with the stipulation and you will cover that later on in the form of testimony.

Mr. PIERCE. We might as well dispose of it at this time.

Exam. HADEN. Will you read what Mr. Pierce stated so that we have a clear understanding of what the stipulation is?

(Thereupon the reporter read the record.)

Exam. HADEN. Does that cover it, Mr. Rynder?

Mr. RYNDER. Well, I merely added the suggestion that instead of taking this and having it copied and put in as an exhibit, since it is a decided case, we could stipulate that the Commission may treat as a fact in the present proceeding any facts found in the decision in Docket 28421, which appears at 255 I. C. C. 579.

Exam. HADEN. Mr. Rynder's suggestion is agreeable to you, Mr. Pierce?

385 Mr. PIERCE. That is agreeable to us.

Mr. RYNDER. While we are on that——

Exam. HADEN. It is entirely agreeable then.

Mr. RYNDER. It just occurred to me that there may be some more facts that one or the other of us might want to refer to in the very recent decision of the Commission in Finance Docket No. 14038, Livestock Terminal Service Company—abandonment of operation; I would be glad to suggest the same stipulation as to that case.

Mr. PIERCE. It is all right with us.

Exam. HADEN. Is it agreeable to all parties? (No response.) Let the record so show.

Mr. BAKER. We would like to have the right to introduce additional evidence with reference to any of those points.

Mr. RYNDER. Oh, certainly.

Exam. HADEN. With that understanding it will be so understood.

Mr. PIERCE. That is, that all parties may introduce further evidence on that.

Exam. HADEN. Yes.

Mr. RYNDER. I think I interrupted you, Mr. Pierce.

Exam. HADEN. Mr. Pierce.

Mr. PIERCE. We should also like to stipulate in connection with the testimony of Mr. Marsh in Ex Parte 127, we will offer
386 that later in the hearing, and we will offer these exhibits as we go along, Mr. Examiner.

Exam. HADEN. Do counsel desire to make any further statements prior to the calling of the first witness for the Complainant? (No response.)

Mr. Rynder, proceed please.

Mr. RYNDER. I will. Mr. Ford.

GILBERT F. FORD was sworn and testified as follows:

By Mr. RYNDER:

Q. Give the reporter your name.

A. Gilbert F. Ford, Assistant Manager of Swift & Company, Chicago, Illinois.

Q. Approximately how long have you held that position, Mr. Ford?

A. 24 years.

Q. Mr. Ford, in preparation for your testimony in this case, did you read the testimony offered by Mr. G. F. Tally on behalf of the Complainant at the first hearing in this case?

A. I did.

Q. And you are familiar with the testimony there given as to the Swift plant, the track lay-outs and all the matters concerning which Mr. Tally testified there?

A. Yes.

Q. And tariff matters?

A. Yes.

387 Q. In addition to that, to familiarize yourself with the physical facts of the case, did you make a visit to Cleveland in the recent past?

A. The early part of May; I think it was May 11th I visited Cleveland and inspected the properties.

Q. Did that inspection include going over on foot the connections of the stockyard tracks here mentioned with the New York Central, and the tracks leading around to the Swift plant and the industries beyond it? You inspected all that visually?

A. Yes.

Q. You are familiar with the location?

A. Yes.

Q. Did you make any other inspection of that property yesterday?

A. I did.

Q. Have there been any physical changes in the track lay-out that were described in the testimony of Mr. Tally and the other witnesses at the first hearing?

A. No.

Q. They are the same as at the time of the hearing?

A. That is correct.

Q. Has there been any changes in the tariffs applicable to the delivery of livestock at the Swift plant since that time?

A. No.

388 Q. In other words, is it substantially correct to say that all the facts shown in the first hearing are in existence and in the same manner and same effect today?

A. Yes.

Q. Now, did you make an effort to find whatever reference there may be to switching to the Swift plant with predecessor companies, as shown in the tariffs of the New York Central Railroad, or its predecessor, the Big Four Railroad?

A. Yes; I made a trip to Cincinnati the day following the May trip to Cleveland, and inspected the tariff files of the carrier and prepared information from April 1904.

Q. Now, before you go into that, did Swift & Company own the original plant which is now part of the Swift plant?

A. No.

Q. How did it obtain it?

A. By purchase on January 24, 1905.

Q. According to the records of Swift & Company, what was the name of the company from whom that plant was purchased?

A. Peoples Packing & Provision Company.

Q. Was there a later purchase by Swift & Company in that immediate neighborhood; I mean immediately north of its original purchase of that property?

A. Yes; that property was formerly known as the Federal Packing Company.

Q. Have you the date of that purchase?

389 A. I do have the date of the purchase; I believe it was stated by you.

Mr. RYNDER. If you are agreeable, Mr. Pierce, our records show that it was on September 27, 1930.

Mr. PIERCE. We have no reason to doubt that.

By Mr. RYNDER:

Q. Have you prepared an exhibit from the information that you obtained from the railroad tariffs concerning deliveries at the Swift & Company plant?

A. Yes; this exhibit is the first part, or in the first part is a chronological statement of the switching charges, April 23, 1904, to the present date.

Mr. RYNDER. I believe it has been distributed to the parties. Before we proceed, may we have it marked as "Exhibit No.——"

Exam. HADEN. Exhibit No. 10.

(Exhibit No. 10, Witness Ford, marked for identification)

By Mr. RYNDER:

Q. Proceed now with your explanation of it.

A. Swift & Company purchased the property known as the People's Packing & Provision Company on January 24, 1905. This exhibit in the first part is chronological statement of the switching provided by the Cleveland, Cincinnati, Chicago and St. Louis Railroad at Cleveland, Ohio, from April 23, 1904, to the present date.

390 At that early date the carrier better known as the Big Four provided in their tariff ICC 2183 that the People's Provision Company was an industry on that line at Cleveland. In addition thereto the tariff provided a charge of $2.50 per car for switching carload traffic received from connecting lines.

Q. May I interrupt?—The date you speak of, April 23, 1904, was before the purchase of the property by Swift & Company?

A. It was before the purchase of the company by Swift & Company, and I may say that it was the earliest date I could find in the carriers' files.

By Mr. PIERCE:

Q. May I interrupt here? Did I get the correct date of the People's Packing & Provision Company purchase; what was that?

A. January 24, 1905.

By Mr. RYNDER:

Q. All right, proceed.

A. Therefore, on traffic consigned to People's Provision Company via the Big Four Railroad, delivery of the car to the People's Provision siding was made by the carrier and cars that reached Cleveland by other lines consigned to the People's Provision Company were switched to the Big Four and delivery made at the People's Provision Company siding by the Big Four. In the latter case, the carriers bringing the cars into Cleveland absorbed the $2.50 per car reciprocal switching to cover the service

391 of delivery at the People's Provision Company siding by the Big Four. Thus the delivery of shipments to the siding of the People's Provision Company whether the line-haul service was by Big Four or a connecting line was at the current rates without any additional charge for switching.

This tariff was in effect prior to the purchase of the People's Provision Company by Swift & Company. The tariffs of the Big Four continued without change until July 15, 1909, except that by ICC 3798, effective July 27, 1907, the name was changed to People's Packing Company, when the word "grade" was added and this merely indicated the area of Cleveland in which the industry was located. However, at this time the name Swift & Company was not added to the tariff even though Swift & Company bought these properties in 1905. The same arrangement remained in effect until February 2, 1915, when the Big Four by Supplement 19 to ICC 6354 added Swift & Company as an industry on its line. All of the other conditions remained the same.

On August 26, 1920, the Big Four issued tariff ICC 7526 in which People's Packing Company was eliminated from the tariff. However, the name Swift & Company continued. On July 31, 1922, by ICC 7886, the carrier changed the area from grade to upper grade by which it is known today. The next change appeared in Big Four ICC 8385 on September 5, 1927, when the reciprocal switching was increased to $3.15 and this remained in effect until March 28, 1938, when this charge was
392 increased to $3.47. The next change appeared in Supplement 44 to Big Four ICC 8785, effective November 12, 1938, by which the reciprocal switching and delivery of livestock to the plant of Swift & Company from connections was discontinued. This did not affect the tariff as to the delivery of livestock which reached Cleveland by the line of Big Four or New York Central, lessee of the Big Four. This is now provided in New York Central tariff 20, ICC 499, which became effective September 15, 1943.

Thus it will be seen that throughout the period of April 21, 1904, to present date the Big Four or New York Central has provided by tariff for the delivery of livestock to the plant of Swift & Company, formerly known as People's Packing Company or the People's Provision Company, and it has only been since November 12, 1938, that the switching from connecting lines has been restricted. There has been no change in the facts concerning the buildings or tracks since the previous hearing in this case.

Q. Mr. Ford, I don't want the Examiner to be misled there; although the New York Central or its predecessor did not change its tariff so as to eliminate delivery of livestock to the plant of Swift & Company, it has refused to perform that switching, has it not?

A. That is a correct statement.

Q. Go ahead.

393 In this connection it is well to refer to certain rules of the present tariff. Rule 115 gives a definition of the term

Industrial Tracks and this definition is a track serving a particular industry, whether located upon the property of these companies or upon property owned or leased by the industry.

Rule 45 of the current traffic provides the following: Except as otherwise provided, the rates named in tariffs applying via these companies to or from points (stations) located thereon, will apply on traffic originating at, or destined to tracks of these companies within switching limits at points (stations) reached by their rails. Also to or from receiving or delivery tracks of connecting lines at such points (stations) when same are available under published switching tariffs at such points (stations), subject to the rules named herein.

The last page of this exhibit shows a list of the packing houses on the New York Central, lessee of the Big Four at Cleveland at the present time. There are ten such companies, only three of which do not bear the restricted note providing that reciprocal switching will not be provided. In other words, of the ten packing houses served by the New York Central at Cleveland, they provide by tariff that they will not accept connecting-line livestock and make delivery to seven of them. The three to which
394 they will make delivery are Cleveland Provision Company, Long Dressed Beef Company and Ohio Provision Company. In other words, the tariff provides that the carrier will make delivery of all livestock reaching Cleveland by this line to all ten of these industries including Swift & Company, but on traffic from other connections the New York Central will only make delivery to three of the companies, not including Swift & Company. This, of course, is not actually what is in effect because the New York Central is refusing to deliver any livestock to the plant of Swift & Company regardless of the line that brings it into Cleveland.

I have been over all of the tracks and pens referred to in this proceeding several times, the last time being yesterday.

Q. Now, refer to the last page, page 5 of Exhibit 10.

Mr. RYNDER. May we be off the record, please?

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. Back on the record.

Mr. RYNDER. Will you read the last question, please?

(Last question read by the reporter.)

Mr. RYNDER. I will delete the question, if I may. I think we are now in a position to stipulate that.

Of the companies named on page 5 of Exhibit 10, Federal Packing Company; Earl C. Gibbs, Incorporated; Koblenzer
395 Brothers; Kreinburg & Krasny; Standard Beef Company;

Swift & Company; Theurer Norton Provision Company, and Hughes Provision Company are all served by the same general track layout that serves Swift & Company, and by that I mean, to reach any or all of them the railroad has to cross the 1,619 feet of track owned by the stockyards. And that so far as the Lake Erie Provision Company are concerned, Long Dressed Beef Company and Ohio Provision Company, they have sidetrack connections with the main line of the New York Central, and in order to serve them, the New York Central does not have to cross the 1,619 feet of track owned by the stockyards company.

Mr. PIERCE. That is right.

Exam. HADEN. Before you go beyond that, you have Mr. Ryder's statement, and there being no objection, the statement of Mr. Rynder will be stipulated in the record.

Have you something further on this exhibit, Mr. Rynder?

Mr. RYNDER. I think not, and what is more, I believe that is all we have on direct. Of course, I might have something on rebuttal, but I would simply like to add that I, myself, made a diligent search, and I know Mr. Ford and the people in our office have, and we have been unable to find any agreement or memorandum of agreement or history of agreement by which the original sidetrack crossing from what you might call the stockyards
396 property across 65th Street to the plant of our predecessor, the People's Packing & Provision Company, was put in; how it was put in and on what date it was put in, or what the terms and conditions of the track arrangements were.

Exam. HADEN. Just a moment. I have some questions.

By Exam. HADEN:

Q. Mr. Ford, what does the designation of "grade" and "upper grade" in your exhibit mean?

A. That is merely the district of the carrier. The carriers designate the various districts in Cleveland. This district was originally known as "grade" and then changed to "upper grade," that particular area there.

Q. It denotes the industrial area?

A. It is an area on the New York Central; it has no other meaning.

Mr. RYNDER. In connection with that question, I might call the Examiner's attention to Exhibit 2, which is a photostatic copy of a certain tariff and shows how those terms are used.

A. Mr. Examiner, there is no difference between "grade" and "upper grade"; it is all the same thing. I merely changed the name from "grade" to "upper grade" on this certain date, and that was by the tariff effective June 15, 1924, as shown on page 3 of the exhibit.

By Exam. HADEN:

Q. It doesn't indicate that there was any change made in the method effecting delivery?

A. That's right, there was no change whatever.

397 Exam. HADEN. You may cross-examine.

Cross-examination by Mr. PIERCE:

Q. Mr. Ford, your statement was, as I recall, that the Big Four switched the People's Packing & Provision Company deliveries in 1904?

A. It was so provided by tariff.

Q. Do you know how a track led from the Big Four into that plant in 1904?

A. The only information we have is what is shown in these various blueprints that are attached to later agreements. The tariff provides that the People's Packing & Provision Company was an industry on the Big Four on April 23, 1904.

Q. My question was: Do you know in what way a track connected the People's Packing & Provision Company with the Big Four track in 1904?

A. I have no agreements to show that.

Q. Do you know if that was a team-track service that the People's Packing & Provision Company had in 1904?

A. The tariff does not indicate it was a team track. It indicates that——

Q. I am asking you what you know, or if you are basing your testimony entirely upon the provisions of the tariff.

A. As to 1904, entirely from what the tariff provides.

Q. Do you know what the basis was for the preparation of tariffs in 1904, 1905, and 1906, back in those days?

398 A. Yes, I do; from my own observation of the publication of tariffs of the Big Four and other railroads.

Q. Do I understand that you have no knowledge of a truck connecting with the Big Four Railroad serving the People's Packing & Provision Company in 1904 except that you infer from the publication in the tariff that the People's Packing & Provision Company was an industry on the Big Four Railroad at Cleveland and that side track was in there?

A. Yes, that is provided for by tariff.

Q. Have you or your company any information as to when the first connection was built to the People's Packing & Provision Company, the first track connection?

A. We were unable to locate that information.

Q. Were you with Swift & Company when Mr. A. R. Fay was traffic manager?

A. I was.

Q. Could you recognize his signature?

A. I think so.

Mr. PIERCE. I think at this point we might save time if we pass over this. I want to submit a stipulation to Mr. Rynder and give him an opportunity to look over a file, and then if we can't stipulate, I would like to pursue this phase later, if I may.

Exam. HADEN. You want a few minutes recess?

399 Mr. PIERCE. Not necessarily right now; if I may proceed with the rest of this and come back to it later——

Exam. HADEN. All right.

By Mr. PIERCE:

Q. Mr. Ford, did the People's Packing & Provision Company at any time receive any livestock in carload lots delivered to their plant?

A. After we took it over, of course we know what the operations were. After Swift & Company took over the company, livestock was delivered to the plant direct.

Q. When was the first—you say you know what took place after Swift & Company took it over—when was the first time that livestock, carload shipments of livestock were delivered by rail directly to the People's Packing Company's plant?

A. Well, that, of course, is something we couldn't determine because we couldn't locate any of their agreements as to when the track was put in. The track was there when we bought the property.

Q. Is not your latter statement and assumption that the track was there when Swift bought the property?

A. No; the tariff provides that it was an industry on the New York Central.

Exam. HADEN. Will you speak louder, please?

A. The tariff provides that it was an industry on the New York Central in the first place.

By Mr. PIERCE:

Q. But, do you know if it was in the location in 1904, if the People's Packing & Provision Company was in the same lo-
400 cation then as it is now, on West 63rd Street; I am asking you if you know?

A. The plant that we bought in 1905 was in the same location.

Q. I am asking you about the track.

A. Yes; the track was there too.

Q. How do you know that the track was there then?

A. Because our records at the office indicate that when we bought the plant, that there was a track serving that plant.

Q. Your records indicate that; is that the correct answer?

A. Yes.

Q. Do you have those records with you, Mr. Ford?

A. No; I didn't bring them. They are our general correspondence files.

Q. Well, your statement is now that the records of Swift & Company show that there was a track connected with the Big Four which served the People's Packing & Provision Company on West 63rd Street in 1904?

A. The general correspondence in our office indicates we were served by the Big Four, but as to the exact location of the track, I can't locate it.

Q. Then, is your answer that you don't know if this same track served the People's Packing & Provision Company in 1904, 1905, 1906, 1907, 1908, or 1909, covering that entire five years?

Mr. RYNDER. Will you read that question, please, Mr. Reporter?

(Last question read by the reporter.)

Mr. RYNDER. Don't take too much time on that, Mr.
401 Ford. Isn't it a fact that the records do not show any detail, the track number, or anything except that you had it?

WITNESS. That is true.

Mr. PIERCE. Whose question is being answered now?

Exam. HADEN. Can you answer that question?

WITNESS. No, I can't.

Mr. RYNDER. He is asking him if the same track served us. I don't know whether it is the same track moved over ten feet, or something like that. I know that I have been over these records and I don't want Mr. Ford to spend too much time on it.

Exam. HADEN. Can you rephrase your question to meet Mr. Rynder's objections?

Mr. PIERCE. Yes; I will try to.

By Mr. PIERCE:

Q. Isn't it a fact, Mr. Ford, that the tariffs in 1904 show the People's Provision Company, Clarke Avenue district?

A. That is correct.

Q. Your exhibit here does not refer to the Clarke Avenue district, does it?

A. That's right.

Q. And then wasn't that later changed, as far as the district is concerned, to read "District"?

A. As to those original tariffs, they were so sketchy, that was generally known as the Clarke District, but specifically
402 as to whether that 1904 tariff said, "Clarke district" I am not certain.

Q. Well, that is another question we will come back to. In the meantime, do you know if the People's Packing & Provision

Company or the People's Packing Company had any other business in 1904 in the Clarke Avenue district?

A. I don't.

Q. Are you conversant with the efforts that Swift & Company made to get a track built along West 63rd Street in a northerly direction and to cross West 63rd Street and to connect with the main track of the Big Four in 1907?

A. No; we couldn't locate a file on that.

Q. Do you have any knowledge of Swift & Company having been instrumental in getting an ordinance passed by the City of Cleveland to permit the Big Four to build this track across West 63rd Street in 1907 or 1908?

A. Our files are apparently lost or destroyed in connection with that.

Mr. RYNDER. I would like to call your attention, Mr. Ford, to the fact that Mr. Pierce is not asking about the street connection you testified about. I don't want you to be confused. He is talking about an additional sidetrack put in 63rd Street and you are talking about the original connection on 65th Street. Look at the map. I don't want you to be confused by counsel.

403 A. I have been talking about the track that served the plant proper, which is on the west side of 63rd Street, not the one on the east side of 63rd Street, which would require crossing of 63rd Street.

Mr. RYNDER. Get this clear, both for you and Mr. Examiner, the street intersecting between the——

Mr. PIERCE. If you will allow me to proceed——

Mr. RYNDER. I won't let you proceed with a street that has nothing to do with this. I will try to protect my witness.

Mr. PIERCE. If the witness will just listen to the question asked, he will have no trouble answering it. No one is trying to confuse him.

Exam. HADEN. Proceed, Mr. Pierce.

By Mr. PIERCE:

Q. My question, Mr. Ford, and we are referring to your Exhibit No. 1—my question referred to whether or not you were conversant with the activity and the undertaking by Swift & Company to a crossing over West 63rd Street up near the Big Four tracks, to get a connection direct with the Big Four and then come along the westerly side of West 63rd Street, in 1907. I am not referring to West 65th Street in any way. I am referring to the track that Swift & Company wanted along the westerly side of West 63rd Street extending northerly and crossing East 63rd Street, and connecting with the main track of the Big Four.

404 A. You mean that track was never put in?

Q. The effort that Swift & Company made to get a connection with the Big Four main tracks in 1907.

A. You are referring to a track that was never put in?

Q. I am referring to an effort made by Swift & Company to get an ordinance passed by the City of Cleveland and ask you if you know about that effort.

A. There was no—our files don't carry that information. There was no track established and there is none today from the north on 63rd Street into our plant.

Q. Mr. Ford, do you know that Swift & Company did procure an ordinance in 1908 to cross West 63rd Street with a track connecting to the Big Four main track in order to have a sidetrack built along the westerly side of West 63rd Street to serve the People's Packing & Provision Company's plant?

A. Coming from the north?

Q. Yes.

A. There was no track ever put in.

Q. I am not asking you about the track.

A. There was no track put in there.

Mr. PIERCE. May I ask you, Mr. Examiner, to have the witness discuss the ordinance and not the track.

Mr. RYNDER. If you don't know about the ordinance, say so.

WITNESS. I don't know anything about the ordinance.

405 We have no file on it. What I am trying to get clear—I don't want confusion in the Examiner's mind—about a track running north.

By Mr. PIERCE:

Q. I don't care about the confusion in the Examiner's mind. Will you kindly answer my questions? Would you say that Swift & Company did not obtain an ordinance in 1907 or 1908 for the Big Four to build a track across West 63rd Street immediately south of the Big Four main tracks so that they could get a connection?

A. I am unable to answer that question because I don't know.

Q. Would you say that they didn't do that?

A. I would say I don't know.

Q. Are you also conversant with the fact that Swift & Company in 1910 procured an ordinance from the City of Cleveland to build the present track across West 65th Street in order to serve the People's Packing & Provision Company's plant?

A. I don't know that Swift & Company secured such an ordinance, although I know there was a track built across there.

Q. Do you know when that track was built across there; I am asking you if you know?

A. I do not.

Q. Would you say that Swift & Company did not procure an ordinance to have the Big Four build a track across West 65th in order to serve the People's Packing & Provision Company which was then owned by Swift & Company?

406 A. I couldn't say whether they secured such an ordinance, because I don't know.

Q. Would you say whether or not Swift & Company furnished the right-of-way to the Big Four to build this connection into the People's Packing & Provision Company's plant, the right-of-way being furnished by Swift & Company beginning a short distance east of West 65th and extending in a northeasterly direction and thence along the west side of West 63rd Street, a sixteen-foot right-of-way to build that track?

A. There is an agreement dated March 19, 1908, between Henry C. Thom and the Big Four, by which a sixteen-foot strip of land running from lots 285 to 255, by which the Big Four was given an easement for the construction, operation, and maintenance of a railroad track across that property.

Mr. RYNDER. Just a minute.

By Mr. PIERCE:

Q. What lots are they; may I ask that first, Mr. Ford?

A. 285 to 255.

Q. 285 to 255?

A. Yes.

By Exam. HADEN:

Q. Can you describe the location of the lots on the map that is now in evidence? What do those lots compare with showing the way out of the Cleveland stockyard area, including the Swift plant?

A. That would be——

407 Q. What exhibit would that be?

A. (No answer.)

By Mr. RYNDER:

Q. What street do those lots abut on on which you gave the easement?

A. On 63rd Street.

Q. Not on 65th?

A. Not on 65th.

Mr. PIERCE. May I interrupt just a moment, Mr. Examiner? We have prepared a map here which we will offer in evidence.

By Mr. PIERCE:

Q. Do you have a map which shows the sublot numbers?

A. Yes, a small one.

Mr. PIERCE. Then, I will withdraw my interruption. I beg your pardon for interrupting you, Mr. Ford.

By Mr. RYNDER:

Q. Is that all to your answer?

A. It would be just at the point approximately where the two—where the one track becomes two tracks moving north along 63rd Street.

By Exam. HADEN:

Q. And those tracks you just referred to parallel the Swift plant?

A. Yes.

Q. Serving the Swift plant?

A. Yes.

By Mr. RYNDER:

408 Q. In order to reach that you would already have to have that track cross 65th Street.

Mr. PIERCE. Well, now, I am objecting at this time to Mr. Rynder taking over the examination, if you will pardon me.

By Mr. PIERCE:

Q. Mr. Ford, you say Sublots 285 to 255?

A. Yes.

Q. Sublot 285 is how far from the main tracks of the Big Four Railroad on the westerly side of West 63rd Street?

A. Well, I don't remember exactly, but it is not—in other words, 255 is the more distant.

Q. That is the more southerly lot?

A. Yes.

Q. And 285?

A. And 285 runs up toward the main line of the New York Central.

Q. This agreement you referred to was 1908, is that right?

A. That's right.

Q. Are you familiar with the appropriation proceeding which Swift & Company requested be filed to condemn part of the property of the Lake Erie Provision Company in order that this connection might be made with the Big Four main track at the northerly end of West 63rd Street in 1908?

A. I don't have any file on that.

Q. Now, isn't it also a fact that after 1908—may I refer you to your map here—after 1908 that Swift & Company

409 caused to be conveyed to the Big Four a right-of-way from your sublot 255 there extending in a southwesterly direction in order to get to West 65th Street?

A. There again our information is not clear.

Mr. RYNDER. What was the beginning of that question, please?

(Question read by the reporter.)

A. There is an agreement dated in October 27, 1910, between the Big Four and H. C. Thom, doing business under the name of the People's Packing Company, which states: "The second party desires a construction of sidetrack at West 63rd Street on the Cleveland division of the Big Four as shown in the blueprint;" but, I don't have the blueprint.

By Mr. PIERCE:

Q. Do you have a copy of that agreement between H. C. Thom and the Big Four, Mr. Ford?

A. Yes. "Said sidetrack to be connected with the Prim Street siding"—that is 63rd Street—"of the division aforesaid on the west side of there, extending northwardly about 258 feet, of which about 86 feet shall be on the land of the first party, the railroad, and about 172 feet on the land owned and controlled by the People's Packing Company."

By Mr. RYNDER:

Q. Now, before you leave that; that location of the lots itself would indicate that that grant was not necessary in order to get the track across 65th Street because the track was not to
410 be on 65th Street or crossing it at all.

A. Yes, sir.

Mr. PIERCE. I object to counsel interrupting here with questions of this kind. It seems to me that if I have the witness for cross-examination, I should be privileged to proceed with it.

Exam. HADEN. The objection is well taken, and I will ask you, Mr. Rynder, to please refrain from interrupting the cross-examination, unless it is for the purpose of clarification.

Mr. RYNDER. And I also submit I have the right to object to questions that are meant for the purpose of confusing the Examiner and the witness on locations and matters of that kind.

Exam. HADEN. That is understood.

Mr. RYNDER. Mr. Pierce has stated that, as if the grant there given had something to do with crossing 65th Street to our original plans, where obviously it does not.

Mr. FITZPATRICK. That might be your view, and we have a different view.

Mr. RYNDER. Well, if two honest minds can view a writing in different ways——

Mr. PIERCE. Mr. Examiner, if I may state here, if we didn't have reason to believe that our proof would show that our questions we are asking now could be proven, I wouldn't be
411 asking this witness questions.

Exam. HADEN. You may proceed.

By Mr. PIERCE:

Q. Mr. Ford, you spoke of an agreement of March 19, 1908. Who were the parties to that agreement, and do you have a copy of it, and if so, will you present it here?

A. That agreement was between H. C. Thom, and the Big Four Railroad.

Q. Now, that H. C. Thom is the same H. C. Thom who did business as the People's Packing Company?

A. That's right.

Q. And the People's Packing & Provision Company?

A. That's right.

Q. And he was an employee of Swift & Company, was he?

A. Well——

Mr. RYNDER. If you don't know, say so.

WITNESS. I don't know.

Mr. RYNDER. I think he was.

WITNESS. I think he was.

By Mr. PIERCE:

Q. Isn't he the same Thom that the Swift & Company bought the plant from in 1905?

A. Yes.

Q. Didn't he continue doing business as H. C. Thom, doing business as the People's Packing & Provision Company for a number of years after Swift & Company bought that business?

A. That appears from the agreement.

412 Q. Let us go back a moment, Mr. Ford, on this question of when first livestock came in, carload-lot shipments of livestock came into the present Swift & Company plant, if you can tell us?

Mr. RYNDER. If you can't, Mr. Ford, say so.

WITNESS. I can't.

By Mr. PIERCE:

Q. Was there any brought in prior to 1933?

A. Yes; there was.

Q. If you know then, when was it prior to 1933?

A. Well, for a considerable period of time prior to that time; I don't remember the exact facts.

Q. Was 1930 the first that any carload shipments of livestock was brought to the Swift & Company plant?

A. Well, my personal knowledge, I can't say how much prior to that.

Q. Do you know if there was any brought in prior to that?

A. Not of my own personal knowledge.

Q. Now, Mr. Ford, again, do any of the eight industries which were stipulated here as receiving service by means of the New

York Central traversing the stockyards track No. 10, did any of those eight packers or industries receive any carload shipments of livestock other than Swift & Company, over this track No. 10?

A. I couldn't say.

Exam. HADEN. Mr. Ford, I will have to ask you to
413 please speak louder; it is hard for me to hear you.

WITNESS. I couldn't say as to the other industries.

Mr. PIERCE. Mr. Rynder, could we see a copy of that agreement of March 19, 1908?

Mr. RYNDER. We can offer it before the hearing is over.

Mr. PIERCE. I may want to question this witness on this agreement; if he will be here at that time, all right.

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record. Mr. Pierce, have we got your question answered on the record now, your last question, was it answered? Read the record, Mr. Reporter.

(Record read by the reporter.)

By Mr. PIERCE:

Q. Now, if I may get back to the agreement, did you refer to an agreement dated 1910, Mr. Ford; I didn't get the date?

A. Yes; the 27th of October 1910.

Q. Now, the agreement you referred to there is the agreement between the Big Four and Henry C. Thom, doing business under the firm name of the People's Packing Company of Cleveland, Ohio; is that correct?

A. That's right.

Q. And does that refer to the construction of a track along the westerly side of West 63rd Street?

414 A. It does.

Q. That agreement had a sixty-day terminating clause in it for both parties, did it?

A. As to usage of the track located on the land of the People's Packing Company.

Q. Will you tell me where that provision is?

A. Paragraph 7 reads as follows: "That the second party reserves the right to have removed at any time upon sixty days' notice in writing to the first party, so much of said track located on the land of second party, the ownership of which is vested in the first party, being the railroad."

Q. Now, doesn't paragraph 7 also provide that the railroad company could terminate that agreement on a sixty-day notice and remove its track?

Mr. RYNDER. The answer is "Yes," it does.

Mr. PIERCE. All right.

By Mr. PIERCE:

Q. Well, isn't that a fact, Mr. Ford, with reference to all of the sidetrack agreements which the Big Four made with Henry C. Thom, doing business as the People's Packing Company predecessor Swift & Company, and also the agreement made with the Federal Packing Company, predecessor of Swift & Company; isn't it a fact that all those had a sixty-day agreement permitting either party to terminate the contract in sixty days?

415 Mr. RYNDER. I will be glad to stipulate, without the witness looking for it, that so far as I know that is in every sidetrack agreement.

Exam. HADEN. You have the agreement with you?

Mr. RYNDER. Yes; he was asking whether that is not so in the other agreements. I will be glad to stipulate that so far as I know it is in every one, the sixty-day termination clause.

Exam. HADEN. When you make reference to all other agreements, that is very indefinite. We don't know what specific agreements you have reference to. I think for the time being we better confine the answer to the particular list to which Mr. Pierce is directing his question.

Mr. PIERCE. That is sidetrack agreements between H. C. Thom, doing business as People's Packing Company, predecessor to Swift & Company, and the Big Four; and the sidetrack agreement between the Federal Packing Company, predecessor of Swift & Company, and the Big Four.

By Mr. PIERCE:

Q. And also, while we are at it, if you know, in the sidetrack agreement with Swift & Company, which was dated November 25, 1916, was there not also a sixty-day terminating clause in that agreement for each party to exercise?

A. That is correct.

Q. The thing I reserved a moment ago was on the question of the tariffs. In your Exhibit No. 10, Mr. Ford, should not there be shown under the first two entries, April 23, 1904, People's

416 Provision Company and July 27, 1907, People's Packing Company; should there not be shown underneath the name of the industry there each time, "Clarke Avenue," the same as you have indicated, "Grade" under the industry and later entries there?

A. If you have the tariff I will be glad to look at it.

Q. Yes, sir.

A. In that tariff on page 11 appears the name of the ——

Q. Which one is that?

A. Tariff No. 415 ICC 2183.

Q. Yes, sir.

A. It provides under the heading of "Road," "Clarke Avenue" and under the heading of "District," "C. C. C. & St. L."

Q. And that is "Clarke," is it?

A. That's right.

Q. On the next entry there, on — or by the way, that entry refers to People's Provision Company?

A. That's right.

Q. And then on the next tariff, 3798, July 27, 1907.

A. This is tariff 47-A-ICC-3798; apparently my Exhibit should have "Tariff 47-A" on it instead of "Tariff 47."

By Exam. HADEN:

Q. You wish to correct your exhibit?

A. The second item opposite July 27, 1907, should be "Tariff 47-A, ICC 3798" instead of just "Tariff No. 47," and that provides the name of People's Packing Company, and under the heading of "Road," "C. C. C. & St. L." and under the heading of
417 "District," "Clark's Avenue."

Q. That is C-l-a-r-k-s?

A. Yes.

Exam. HADEN. Mr. Pierce, may I interrupt?

Mr. PIERCE. Yes.

By Exam. HADEN:

Q. "Clarks District"—now, that Clarks District is the same district to which you have just previously referred to as "Grade" and "Upper grade"?

A. Those were changed as they went through the tariffs.

Q. But the area is the same?

A. The area is the same.

Mr. PIERCE. At this time, if the Examiner please, I would like to submit to Mr. Rynder, a stipulation on the contents of our file referred to in the earlier part of the hearing. He may probably want to examine it and discuss it with the witness [indicating].

Exam. HADEN. Mr. Rynder, you may take a look at it while we recess here, or you may want to take the luncheon period to examine it, which might be quite lengthy.

We will recess for twenty minutes, gentlemen.

(Recess had.)

Exam. HADEN. All right, gentlemen, come to order, please.

Mr. RYNDER. Mr. Examiner, at the recess I have examined the file handed me by Mr. Pierce and also the document
418 headed "Stipulation," which purports to be a memorandum of some of the documents in that file. I think that the proposed stipulation fairly reflects what is shown by the document, and I am willing to have it put in here any way it is desired. If so desired, it can be copied in as a stipulation between the parties.

Exam. HADEN. Mr. Pierce.

Mr. PIERCE. That was our desire. We would like to make it an exhibit, if we may, and we would also like the privilege of having reproduced a map which accompanied one of the exhibits there, which I didn't want to remove from the file until all parties have seen it. We would like to reproduce this map and introduce it along with this stipulation. If this stipulation might be marked "Exhibit 11," Mr. Rynder, and then the map which we will reproduce and supply will be Exhibit 11-A.

Exam. HADEN. One moment, please. The stipulation will be marked for the purpose of identification as "Exhibit 11."

(Exhibit 11, marked for identification.)

Exam. HADEN. Now, will you state, Mr. Pierce, just what purports to be embraced within the document which you have offered as a stipulation?

Mr. PIERCE. Then 11-A will be a map.

Mr. FITZPATRICK. Off the record, please, Mr. Examiner.

Exam. HADEN. Off the record, please.

418A (Discussion had outside the record.)

Exam. HADEN. On the record.

Mr. PIERCE. Well, this Exhibit No. 11 consists of four pages, which is a résumé and summary of the C. C. C. & St. L. Railway Company file No. 44540 entitled "People's Packing Company." The file was in the custody and control of Mr. J. E. Anderson, freight traffic manager of the New York Central at Cleveland, Ohio and contains various communications between Mr. A. R. Fay, traffic manager of Swift & Company, and traffic officers of the C. C. C. & St. L. Railway Company, beginning with September 14, 1907, and continuing to April 26, 1912.

Exam. HADEN. Contains seven pages in all; is that correct?

Mr. PIERCE. It will contain eight, Mr. Examiner, when Exhibit A is supplied.

Exam. HADEN. That will be a diagram of the track lay-out.

Mr. PIERCE. That will be a diagram of the track lay-out which accompanied the letter of Mr. A. R. Fay dated September 14, 1907.

Exam. HADEN. If there is no objection it will be received in evidence, there being no objection noted.

(Exhibit No. 11, received in evidence.)

Mr. PIERCE. Checking that, the stipulation is Exhibit 11

419 and the exhibit to be supplied is 11-A, and the three letters attached with be 11-B, 11-C, 11-D.

Exam. HADEN. Now, off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record. It will be understood that you will furnish this map, if you describe it sufficiently, it will be

understood that you will furnish it within ten days and will be considered as part of the stipulation.

Mr. PIERCE. In order to simplify it, I will see if we can't have it photostated immediately and save the rest of the exhibit.

As I understand, Mr. Rynder, you are going to let us have that agreement of March 9, 1908; I think that was the date?

Mr. RYNDER. Yes. Now, just following in connection with this stipulation, I think I ought to make this statement: That that file and memorandum of it, which apparently has not been preserved in our files, a[illegible] with which I was not acquainted until I saw today, would apparently indicate that the track connection which we have been talking about, which crosses 65th Street from the stockyards property to the Swift & Company plant, was put in in 1910 and not as our witness indicated, prior to 1905. To my mind that is the important fact indicated by the stipulation.

Exam. HADEN. Does that complete your statement, Mr. Rynder?

420 Mr. RYNDER. Yes.

Exam. HADEN. Mr. Ford, will you please take the stand, again?

EXAMINATION BY EXAMINER

By Exam. HADEN:

Q. Mr. Ford, your livestock shipments are being received at the present time in what manner?

A. Through the stockyards company because of the change that was put into the New York Central tariff, that so far as the connecting line traffic is concerned, and because of the refusal of the New York Central Railroad to deliver traffic which reached Cleveland by their line.

Q. Was that a positive refusal? Or was it a qualified, or was it subject to a certain payment in addition to the line haul rate that delivery could be effected?

A. No; there was no condition under which they could be delivered.

Q. That was the only facility whereby you could receive your stock at the plant over the stockyards property; over the loading and unloading platform?

A. That's right.

Mr. RYNDER. Mr. Examiner, as I know, but you may not be perhaps familiar with the entire record, perhaps part of that question may be answered by Exhibits 4 and 5 at the previous hearing. I call your attention to Exhibit 5, which is a letter from the railroads to Swift & Company.

421 Exam. HADEN. Thank you.

By Exam. HADEN:

Q. Now, Mr. Ford, are you familiar with the developments within the past few months concerning the delivery of stock at the Cleveland Stock Yards?

A. Slightly.

Q. Do you know that it was proposed and Division 4 of the Commission authorized the Livestock Terminal Service to abandon the operation?

A. I understand they did.

Q. As of June 19th?

A. June 19th.

Q. Now, that suspension, however, has been postponed for a period of sixty days, as I understand, by the Livestock Terminal Service Company, postponing the cancellation date for sixty days beyond June 19th?

A. Yes, sir.

Q. Now, in the event that service was discontinued and no other provision was made for the loading and unloading of livestock at the Cleveland stockyards' loading and unloading facilities, do you know of any way that you can get stock into your plant?

A. No other facilities other than——

Mr. RYNDER. I take, you mean, by railroad?

Exam. HADEN. By railroad; yes.

A. No other facilities available. The Stock Yards Com-
422 pany is the only place.

By Exam. HADEN:

Q. It is your understanding then, that if this discontinuance did come about, that the only means by which the Swift & Company plant could obtain livestock would be through truck operations?

A. Or by rail to our own plant subject to these conditions which we mentioned.

By Mr. RYNDER:

Q. Well, you mean you could get it delivered by rail?

A. Yes; if we could get it delivered by rail to our plants, we have the pens.

Q. I am assuming that if the conditions of the stockyards do not change any and that continues and the Livestock Terminal Service Company went out of existence and no service was substituted at the loading and unloading docks of the Cleveland Union Stock Yards Company, there would be no way that Swift & Company could receive livestock by rail?

A. That's right.

Q. Do I understand that your investigation failed to disclose any agreement of any kind, either formal agreement or through

correspondence relating to any sidetrack agreement—when I say "sidetrack agreement," I mean a track of the Stock Yards Company that is necessary for the railroads to use in order to effect delivery at the Swift & Company plant?

A. None of the agreements that we have bear any refer-
423 ence to that.

Q. You are unable to find even a verbal agreement of any kind or oral agreement? It is your information, or does your information show that it was just come about by usage or custom?

A. When they established these tracks into our plant, they did hook onto the New York Central tracks and those New York Central tracks hooked onto the Stock Yards' tracks, and which in turn hooked onto the main track of the New York Central. In other words, you get off the New York Central line onto a Stock Yards Company track, and then onto a New York Central track, and then onto the Swift & Company's tracks.

Q. Now, my question related to an agreement of any kind relating to the use of that portion of the track that is used by the railroads that is owned by the Stock Yards Company?

A. There is nothing in any of our agreements referring to that.

Q. We might have this already in the record, but I want to be sure it is shown. What is the capacity of your unloading facilities at the plant, in cars?

A. Well, on that track that runs along the side of the building—there are two tracks there—you can set in, I would say, along our—through our property, buildings, and the land, I think you could set probably 15 cars on the two tracks.

Q. Well now, could you unload those 15 cars all at the same time, or would you have to pull four or five in and unload those, and pull in the other cars?

424 A. My inspection of the tracks yesterday indicated by using a movable platform alongside of the car that we probably could unload six cars at a time.

Q. Your plant facilities would permit unloading livestock in such quantities?

A. Yes. We have one chute in through the building, which is referred to on the—on one of the blueprints.

Q. Here is the record [indicating].

A. On Exhibit No. 1, which is a map, there is a location marked as a "Y," and it is just about that location where there is a chute through our plant into pens that are marked about where the "X" is shown on that exhibit. There are ten pens in that area marked by the "X" capable of holding eight carloads of livestock. Now, all of the track from the "Y" south, practically to 65th Street, is available for unloading.

Q. And you do have facilities to unload at a single placing of approximately fifteen carloads of livestock?

A. No, no; because that contemplates two tracks. There are two tracks along this side of the plant and that placement of that many cars would be by the use of both tracks; the inner track I judge would hold about six cars.

Q. That would be the track from which you would unload livestock into the plant?

A. That is correct.

Q. You have track facilities for fifteen cars, but unloading
425 facilities for unloading six at one time?

A. Yes.

By Mr. RYNDER:

Q. That is, six livestock cars?

A. Six livestock cars.

Exam. HADEN. Are there any further questions of Mr. Ford at this time? He will be recalled later on in the proceeding.

Mr. PIERCE. I would like to ask him two or three questions, if I might.

Exam. HADEN. You may.

Cross-examination (resumed) by Mr. PIERCE:

Q. Mr. Ford, is it a fact that the only door into your plant along the westerly side of West 63rd through which livestock are unloaded from livestock cars and could now be unloaded from livestock cars, is that door along which side there is the figure 7?

A. That is not exactly correct. The fact is that the livestock that was in the past unloaded are unloaded through the one door referred to in my statement to the Examiner.

Q. That is the door marked No. 7?

A. "Y," on that exhibit we were looking at.

Q. I mean on the building. If you remember what it was marked there?

Mr. RYNDER. It does not show here.

By Mr. PIERCE:

426 Q. And then, when the stock was unloaded into that one door, then it was driven through this building toward the west, toward West 65th Street; is that correct?

A. In the direction of West 65th Street, to the pens.

Q. To the pens which are located over joining the easterly side of West 65th Street; is that correct?

A. Yes.

Q. How far is it from the car door where the livestock would enter this building, over to where the entrance—did you say, eight pens you have there?

A. Ten pens.

Q. How far is it from the car door where the livestock would be unloaded over to the entrance to these ten pens?

Mr. RYNDER. This blueprint did not show; it doesn't even show the pens. This blueprint you handed me does not——

A. I would say probably 150 feet.

Mr. RYNDER. Mr. Ford, give your best judgment on it, and if you can't, say you can't.

Mr. PIERCE. Mr. Rynder, if I might ask, is there any reason why we couldn't know the dimension of those pens, and the location of them?

Mr. RYNDER. Not at all; we simply didn't get it. There is no secret about it.

Mr. PIERCE. Is it all right if our engineers went over and made the measurements?

Mr. RYNDER. Absolutely.

427 Mr. PIERCE. May we do that, and that would dispose of the assumption about the pens.

Mr. RYNDER. We didn't know that the question would be asked.

Exam. HADEN. And the witness, I understand, is not in a position to state?

WITNESS. I don't know the dimensions.

Mr. PIERCE. May we stipulate what the particular dimensions about the area of the pens and within the Swift & Company's plants and the location of those pens will be as provided by the engineering department of the New York Central, if they will be permitted to go on the premises, and we will file it?

Mr. RYNDER. They will be permitted to go there and their returns will be correct. I would simply like to call the Examiner's attention to the fact that the approximate location of those pens have been identified and Mr. Ford says it is ten pens and capable, as he understands it, of holding eight cars.

Exam. HADEN. I don't want any statement submitted after the close of the hearing to which there would be a difference of opinion as to the correct measurements.

Mr. RYNDER. I won't quarrel with any engineer who measures them, as to the size.

WITNESS. I don't know the measurements, your Honor. We didn't measure them at all. From our observation and

428 actual experience, there are facilities for eight carloads of livestock, ten pens.

Exam. HADEN. Couldn't it be determined before we convene this afternoon so as to eliminate the necessity of supplementing additional documents to which there might be a difference of opinion as to the exact dimensions?

Mr. PIERCE. I have a party here from the engineering department, and maybe we can get that information.

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record.

Mr. PIERCE. We will have to make inquiry and see what can be done, Mr. Examiner. They are working short handed in the engineering department. Suppose we make an inquiry during the noon hour?

Exam. HADEN. All right.

Mr. PIERCE. I have a couple of other questions, Mr. Examiner, if I may ask the witness.

Exam. HADEN. Proceed.

By Mr. PIERCE:

Q. Mr. Ford, when you say that six cars could be placed at this one door at one time——

A. Not at the one door.

Q. How would you place them in order to unload them?

A. Along the tracks there using movable chutes for unloading as is the general practice in a lot of stations throughout the
429 country.

Q. Now, Mr. Ford, referring to Exhibit 1, which is a map showing the location of Swift & Company's sidetrack along the westerly side of West 63rd Street at the point "Y" is a location "A" where the door is located in the Swift & Company building through which livestock was unloaded from railroad cars?

A. That is correct.

Q. And where one car at a time had to be placed to unload it; is that correct?

A. Yes.

Q. The building next south to that is your cooler or refrigerator building?

A. It is another building; I don't know what it is.

Q. There is no place to put a portable platform along south of this doorway marked "Y" to enable you to unload a car more than one at a time?

A. Immediately south of that space is—which runs completely through our property to 65th Street——

Q. I am talking about the building next south to the point marked "Y"; isn't that your cooler or refrigerator building?

A. It is a building into which we couldn't drive livestock.

Q. You couldn't drive livestock, and also you couldn't use a portable chute along that?

A. That is true.

Q. Isn't that same thing true with reference to the build-
430 ing alongside of the track north of the point "Y"?

A. Yes.

Q. The building is built close up to the track?

A. Yes; the only place for unloading livestock into buildings is the one location we have referred to.

Q. Then today, wouldn't you have to place one car at the door and unload it, and then move up and place another car at that door and unload that in order to unload your livestock?

A. We would if we didn't take deliveries at points further south of that last building.

Q. When you refer to points further south, you are referring to what would be a new enterprise or development or putting in facilities at points south of the building?

A. Merely putting up a movable chute.

Q. There are no facilities there at this time?

A. No.

Q. You have cold storage there?

A. On part of it.

Q. What is on the other part of it?

A. There are barrels on another part; the balance is vacant.

Q. It has never been in the past equipped for receiving livestock cars from the railroad?

A. Not for that purpose.

By Mr. FITZPATRICK:

Q. There are no pens there for holding the stock?

431 A. The stock, if unloaded from these tracks, would be driven across the vacant lot of ours into the pens which are referred to previously.

Q. But, do you have—

A. These ten pens.

Q. Pardon me; do you have border lanes that would serve as alleys for the stock?

A. We do not.

By Mr. PIERCE:

Q. Mr. Ford, the stock pens you have referred to as numbering ten, are they the same pens in which your truck stock is unloaded into and stored?

A. They are.

Q. They are the same pens?

A. Yes.

Q. Then, the condition of your storage pens inside the Swift & Company's plant is the same at this time as it was at the time of the hearing in 1942 and for some prior to that?

A. Yes.

Q. Now, with reference to the Cleveland Union Stock Yards Company, do you know if any officers of Swift & Company were directors of the Cleveland Union Stock Yards Company?

A. I do not.

Q. Do you know if any officer of your company was a member of the Executive Committee of the Cleveland Union Stock Yards Company?

A. I do not.

432 Q. Are you familiar with the ownership of stock of the Cleveland Union Stock Yards Company by Swift & Company up until 1936?

A. I have no knowledge of it.

Q. Do you know anything about a so-called Traffic Committee that was formed for the purpose of expediting traffic in the stockyards district and harmonizing operations, and promoting the general welfare of the district?

A. No.

Q. You don't know of an officer of Swift & Company that was ever a member of the Traffic Committee?

A. I do not.

Mr. PIERCE. I think that is all.

Exam. HADEN. Mr. Fitzpatrick.

By Mr. FITZPATRICK:

Q. Mr. Ford, you were asked by the Examiner a question as to the possibility of receiving stock in case you could not use your own track and in case there was no service by the Livestock Terminal Service Company or some other company at the stockyards. Wouldn't it be possible, as a matter of fact, to receive stock on team tracks from the railroads and truck the stock to your plant?

A. I don't know of any such facilities.

Q. Well, don't you know all the railroads here in Cleveland have team tracks?

A. I assume they do, but I didn't know they had any livestock unloading facilities at those team tracks, particularly any chutes for unloading livestock.

433 Q. But, in making your answer, you didn't give any thought at all to the possibility of receiving stock at public team tracks?

A. The connecting line carriers have never offered any stock except through the stockyards, particularly since this change was made in the tariff.

Mr. FITZPATRICK. That is all.

Exam. HADEN. Any further questions at this time of Mr. Ford? Mr. Ford will be recalled later on.

Mr. PIERCE. I have a couple, but I will reserve them.

Exam. HADEN. You can go along now.

By Mr. PIERCE:

Q. If a car of livestock was placed at this door at your plant where formerly livestock from cars was unloaded, wouldn't that block your other truck traffic that comes in that particular door?

A. It would not block any truck traffic.

Q. Isn't there a driveway built across there from West 65th Street where trucks back up and use that door?

A. Trucks can back up to take traffic.

Q. Isn't that doorway's principal interest of entrance and ingress in and to the plant for truck deliveries?

A. No.

Q. I mean all supplies other than livestock?

A. The principal—is through the garage facility of what was formerly known as the Federal Packing Company and the
434 old Swift Company property. In other words, that space between the two plants has been covered over with a garage roof, and that is the principal truck dock.

Q. What is this doorway used for generally, the one you say was used for unloading livestock?

A. Well, it is used for unloading—had some hay through that door, which is for general purposes, but generally not used for any products that are generally known as packing house products, fresh meats, and so forth.

Mr. RYNDER. May we be off the record, please?

Exam. HADEN. Off the record.

(Discussion had outside the record.)

Exam. HADEN. On the record. We will recess until two o'clock.

(Hearing recessed at 12:20 p. m. to 2:00 p. m.)

AFTERNOON SESSION

Exam. HADEN. Come to order, please, gentlemen. Mr. Rynder.

Mr. RYNDER. Before the next witness goes on, there is a matter I thought perhaps we could settle now. Since we were having this hearing, our engineer has gone out to the plant and made a rough sketch of the pens shown, the areas, the dimensions, and the size of each pen. We could have that either made up
435 into a respectable blueprint filed within ten days, or the engineer or one of the railroad's engineers might want to consult with our engineer before we do that.

Mr. PIERCE. I did call our engineering department, and I believe that we can agree upon what the area and the location is.

Mr. RYNDER. All I want you to agree is to have it put in after the hearing.

Mr. PIERCE. That is all right; we can agree on that. If we agree on the blueprint which is filed, is that all right?

Exam. HADEN. Yes. Now, have you decided that you will put that in later?

Mr. PIERCE. We will agree on the blueprint; our engineers are on the way over now and will come in later in the afternoon.

Exam. HADEN. If you want to hold that until later this afternoon——

Mr. PIERCE. All right; we might agree on it later on.

Exam. HADEN. Mr. Rynder, just before our noon recess, Exhibit 10 was marked for identification, and if there is no objection, the Exhibit 10 will be received in evidence.

Mr. RYNDER. Thank you.

Mr. PIERCE. No. 10 was what?

Exam. HADEN. Mr. Rynder's tariff exhibit.

Mr. PIERCE. Oh, yes.

436 (Exhibit No. 10, Witness Ford, received in evidence.)

Exam. HADEN. Mr. Rynder, do you have any further witnesses?

Mr. RYNDER. Not on direct, but I may have some on rebuttal.

Exam. HADEN. Mr. Pierce, are you ready to proceed?

Mr. PIERCE. Yes, sir; we would like to call Mr. Pastor.

A. B. PASTOR was sworn and testified as follows:

Direct examination by Exam. HADEN:

Q. Give your full name and position.

A. My name is A. B. Pastor. I am assistant engineer on the New York Central.

By Mr. PIERCE:

Q. Mr. Pastor, are you conversant or familiar with the stockyards and facts at the stockyards over the past, say, ten years; have you been in there more or less?

A. I believe I am.

Q. Have you in connection with your work done or had prepared under your supervision or cooperation, the blueprint which I now hand you, and which we will mark for identification as——

Exam. HADEN. Exhibit 12, which has on it "Real Estate transfers" in the lower right hand corner.

Mr. PIERCE. That is the title of the matter. We used this

437 map to indicate the sections of the track, so, it isn't in here. for the purpose of indicating real estate transfers.

(Exhibit No. 12, Witness Pastor, marked for identification.)

By Mr. PIERCE:

Q. Will you indicate where on Exhibit 12 the Big Four Railroad tracks are?

A. The Big Four Railroad tracks extend on the upper part of the map, the one to Cleveland on the right.

Q. Now, will you indicate the route that the track takes and where the track is shown on this blueprint which diverges from the Big Four main tracks and goes on to the property of the stockyards on the westerly side of West 65th Street?

A. The point "A" beginning of this side track serving the Union Stock Yards and these other plants. It goes down from A, B, various letters C, D, and E, and then it switches back coming back from D, F, G, H, and so forth into the plant of the Swift & Company.

Q. Now, will you tell us: Section A, B, is what part of the track?

A. Section A, B, is part of the track owned by the Big Four Railroad.

Q. Section B, C?

A. That is owned by the Cleveland Union Stock Yards.

Q. And then will you go ahead and delineate from Section C on to the left, the south and west, just what sections, what tracks are there?

438 A. The C–3 is owned by the Cleveland Union Stock Yards Company. From C–3——

Q. You are speaking now of land on which the track is located; is that right?

A. I was speaking of the track itself.

Q. You were speaking of the track itself. All right.

A. Would you like to have it divided as to the land?

Q. We will do that after you indicate the stockyards area there.

A. From C–3 westward to E is owned by the railroad company.

Q. The track is owned by the railroad company?

A. The track is owned by the railroad company. Starting at point D coming eastward from point D, F, G, H, J, K, L, M, to point W is all owned by the railroad company except the portion approximately fifty feet shown green there, which I believe is owned by the Swift and Company.

By Exam. HADEN:

Q. You believe; do you know whether it is owned by Swift & Company?

A. Yes; it is owned by Swift & Company.

By Mr. PIERCE:

Q. Now, Mr. Pastor, beginning again at point C which is just west of West 65th or Gordon Street——

A. Gordon Street?

Q. Gordon Street, from point C to C–1, what is the name of the property owner adjoining that track?

A. The property owner shown on this plan is the Standard Beef Company.

439 Q. From C–1 to C–2, the ten foot strip.

A. It is a ten-foot strip reserved and owned by the Union Stock Yards.

Q. From C–2 to C–3, what is the name of the industry?

A. The name of the industry there is Kreinburg & Krasny.

Q. Then, from point C–3 to D, will you tell us what section of the track that is?

A. That is the portion of the track owned by the railroad on the property of Kreinburg & Krasny.

Q. Now, in order to get from the Big Four main tracks to Swift & Company's plant on West 63rd Street, where do the switching movements have to go in order to get back over there?

A. Switching movements would have to start at point A which leaves the main line; proceeds to point D and past the point with sufficient room to switch back from 65th Street to 63rd Street.

Q. Does this show the track lay-outs, sir, as they exist now?

A. Yes.

Q. As they have existed for some time?

A. As they have existed for some time.

Q. Now would you explain for the record, please, what the track is from point L along West 63rd Street, the westerly side of West 63rd Street?

A. From point L along the westerly side of 63rd Street there are two tracks. The westerly track is the one adjacent to
440 the Swift & Company buildings and the easterly track is the second track that passes down past their plant.

Q. And extends north to what other plant?

A. Extends north to the Theurer Norton Provision Company and I believe two other packing concerns served from that track.

Q. Those concerns are what?

A. The Hughes Provision Company and Koblenzer; I believe that is Provision Company or Koblenzer Company.

Q. You have just referred to the tracks along the westerly side of West 63rd Street and they extend from point L to what points on this map?

A. From point L to points W, X, P, and Y. I would like to take that letter P out of there; that is the end of the right-of-way.

By Exam. Haden:

Q. You want the P out; that is at the end of the ——

A. At the end of the eastern—I mistook it myself.

By Mr. Pierce:

Q. Will you describe what the section of the track is, beginning at J crossing Prim Street?

A. From J, T there is a portion of the track owned by the railroad company crossing Prim Street; on the easterly side of the

street serves two tracks owned by Swift & Company extending from T to V for the easterly track, and from T to the property line shown on the westerly track. The westerly track continues to serve Theurer Norton Provision Company to point U.

Q. Now, for ready reference, Mr. Pastor, is there a
441 legend on this blueprint which shows the sections of the track, by whom they are owned, and on whose property the tracks are located?

A. Yes, sir; the legend on the right hand end of the plan.

Mr. PIERCE. We would like to offer this exhibit in evidence at this time [indicating].

Mr. RYNDER. No objection.

Exam. HADEN. If there is no objection, it will be received as marked "Exhibit 12."

(Exhibit No. 12, Witness Pastor, received in evidence.)

By Mr. PIERCE:

Q. Now, Mr. Pastor, I hand you what we will have marked for identification as "Exhibit 13" [indicating].

(Exhibit No. 13, Witness Pastor, marked for identification.)

By Mr. PIERCE:

Q. This map being marked in the lower right hand corner, "Revised June 21, 1944, tracks serving Cleveland Union Stock Yards Company," and ask you if you are familiar with and have knowledge of the tracks and the designation of the tracks as shown by that plan?

A. Yes, sir.

Q. Was this plan prepared by you or did you cooperate in the preparation of it and have some connection with the supervision of it?

A. Yes, sir.

Q. This map shows now—well you tell us briefly what it shows as set forth in the legend on the map?

442 A. Tracks owned and maintained by the railroad company are shown by red. Tracks owned by the Cleveland Union Stock Yards Company and maintained by New York Central Railroad at railroad expense are shown by red and yellow. This information is shown on the key on the right-hand portion of the map. And tracks owned by other industries and maintained at industry's expense is shown by the solid yellow line.

Mr. PIERCE. We would like to offer this Exhibit 13 in evidence.

Mr. RYNDER. No objection.

Exam. HADEN. If there is no objection it will be received in evidence as Exhibit 13.

(Exhibit No. 13, Witness Pastor, received in evidence.)

By Mr. PIERCE:

Q. Mr. Pastor, have you had occasion to make an investigation and inquiry into the history of some of the tracks at the Cleveland Union Stock Yards which are shown on Exhibits 12 and 13?

A. Yes.

Q. In your investigation did you ascertain when the track from F to G on Exhibit 12 was built across West 65th Street?

A. Well, from the files I would say it was built sometime in September or October of 1910.

Q. And on what do you base that statement?

A. My statement is based on letters from the engineer of maintenance-of-way to the superintendent of the Big Four stat-
443 ing that the track was under construction at that time.

Estimates showing its costs, and correspondence relating to an agreement to cover its cost and reference to agreement covering the use of the track.

Q. And the estimate of the cost, which you say was made in 1910, at which time the file indicates that the track was being built, will you state just what track was indicated in that estimate, indicating on Exhibit 12?

A. D, F, G, H, J, K, L, O, M, X, and L, W.

Exam. HADEN. Will you read that answer, please?

(Last answer read by the reporter.)

By Exam. HADEN:

Q. Well now, the portion of the track that is used, included in your statement, Mr. Pastor, does not that include a short strip of track which you say is owned by Swift & Comnay at the end?

A. I can't say; I think that portion shown in green, ending at letter W, was constructed some time later than that; I am not sure.

Q. And wasn't included in the plan which you have recited?

A. I don't think it was; there have been several minor track changes made there from the original proposal, of course.

Exam. HADEN. That is all.

Mr. PIERCE. That is all.

Mr. RYNDER. No questions.

Exam. HADEN. Just one moment, Mr. Pastor. Off the
444 record, please.

(Discussion had outside the record.)

By Exam. HADEN:

Q. Well now, Mr. Pastor, the portion of the track which is shown on your map as being owned and operated by the New York Central, beginning with that portion marked "G" and going on down to N, is that track built on the railroad right-of-way, or is that over Swift & Company's line?

A. I believe that is all railroad right-of-way; that is the easement.

Q. Where does Swift & Company's property begin which is designated on your map, "26," if you know? If you don't know, I can get Mr. Rynder——

Mr. PIERCE. Mr. Cobbe can explain that. He is the next witness.

Exam. HADEN. All right. Are there any further questions of Mr. Pastor? (No response.)

If not, you may be excused. Thank you, sir. (Witness excused.)

Mr. PIERCE. I will call Mr. Cobbe.

RICHARD C. COBBE was sworn and testified as follows:

Direct examination by Exam. HADEN:

445 Q. Give your full name, please, and your occupation, to the reporter.

A. Richard C. Cobbe, Land and Tax Agent of the New York Central Railroad, with headquarters at Cleveland.

By Mr. PIERCE:

Q. How long have you been with the New York Central, Mr. Cobbe?

A. 28 years.

Q. Did you have occasion to make an investigation and inquiry concerning lands, title to lands, and other proceedings in connection with the property and tracks at the Cleveland Union Stock Yards and Swift & Company's plant in that area?

A. Yes.

Q. Did you make a trip to Cincinnati and Springfield to see if you could locate all the plans and correspondence that might be available, of the Big Four?

A. Yes.

Q. What further investigation did you make?

A. As to the files you mean?

Q. Yes; any data on these tracks?

A. Well, that just about constitutes my search; it was most entirely a file search through the different departments which took me to Cincinnati and also with some correspondence with the Chicago office.

Q. And after corresponding with the Chicago office, were you able to locate any further files?

A. Well, I found that the traffic department files which
446 were in Chicago for the period of 1908 to 1910 had been removed to Cleveland, and I later found that file in the local traffic manager's office.

Q. And that file was under the heading of the People's Packing Company?

A. Yes, sir.

Q. Now, Mr. Cobbe, have you at times earlier than the last two weeks, had occasion to go into land matters in and near the stockyards and that area out there for the railroad?

A. I had an occasion, yes, in a period of years.

Q. In your investigation did you look up and locate an ordinance No. 10944 passed by the City of Cleveland on May 25, 1908, in connection with a track to be built or proposed to be built across West 63rd Street immediately south of the Big Four tracks?

A. I did.

Q. Do you have a copy of that ordinance?

A. There is one available.

Mr. PIERCE. We have this exhibit here, which will be Exhibit No. ——

Exam. HADEN. No. 14 for identification.

(Exhibit No. 14, Witness Cobbe, marked for identification.)

By Mr. PIERCE:

Q. We will hand you what has been marked for the purpose of identification as "Exhibit 14" and I will ask you to state if that is the ordinance which you ascertained from the records of
447 the City of Cleveland which was passed in—what was that date—May 25, 1908.

A. That is not the paper [indicating].

Q. And will you state——

Mr. RYNDER. He said "that is not the paper."

A. 10944.

By Mr. PIERCE:

Q. I hand you what we will—leave that temporarily and have copies made. I will mark it for identification as "Exhibit No. 14."

Exam. HADEN. You have no copy to go into the record at this time?

Mr. PIERCE. We haven't the copies to go into the record, apparently.

Exam. HADEN. When will you have it, Mr. Pierce?

Mr. RYNDER. I am agreeable to have counsel send it in later and have it marked then.

Mr. PIERCE. All right.

Mr. RYNDER. But could I see it now?

Exam. HADEN. Surely. Off the record, please.

(Discussion had off the record.)

Exam. HADEN. On the record.

By Mr. PIERCE:

Q. Now, Mr. Cobbe, will you state just where the crossing of West 63rd Street with this track was supposed to be made under this ordinance 10944 of April 25, 1908.

A. The ordinance, as designated, referred to the red line as shown on the map as the location for the track.

448 Q. That red line extends from where on the north to what point on the south?

A. That extends from a connection with the Big Four Railway at the easterly boundary of West 63rd Street, formerly Prim Street, to a point of intersection with the westerly boundary of West 63rd Street at about lots 279 and 280, the dividing line between those two lines.

Q. That is on the westerly side of West 63rd Street?

A. Westerly side of West 63rd Street.

Q. Now, did you also find a court record of a restraining order granted to the Lake Erie Provision Company on or about June 5, 1908, and if so, will you state what that court record shows with reference to this restraining order?

A. The Lake Erie Provision Company who were the owners of the land on either side of West 63rd Street at its junction with the south line of the Big Four Railway filed an action in Common Pleas Court of Cuyahoga County under date of June 5, 1908, against the Big Four Railway, and obtained a temporary restraining order which was later made permanent, restraining the railroad company from constructing this track according to the ordinance.

Q. Now, following that, Mr. Cobbe, what was the proceeding you found with reference to appropriations filed in Insolvency Courts and appealed to the Common Pleas Court in connection with the Lake Erie Provision Company's land at or near the

449 point where this proposed crossing of West 63rd Street by the track would be constructed?

A. The condemnation proceedings were later filed by the Big Four Railway and tried in Insolvency Court of Cuyahoga County, but in the May 1909 term the Railway Company was granted a petition to condemn some part of the Lake Erie Provision Company's land and a verdict of $13,500 was awarded the Lake Erie Provision Company, which both parties appealed.

Q. And you know the date that both parties, that is, the railroads, and the Lake Erie Provision Company appealed that appropriation proceeding?

A. I have that date here [indicating].

Mr. PIERCE. Well, I have obtained it from the record. The railroads appealed on October 21, 1909, and the Lake Erie Provision Company appealed it on October 20, 1909. Is that agreeable to you, Mr. Rynder, if I stated it?

Mr. RYNDER. Yes; and if you want to state the rest of it, it is okay.

Mr. PIERCE. Well, all right, we might simplify it. On September 6, 1910 ordinance No. 18748 was procured by Swift & Company for the crossing of West 65th Street for the track leading from the west side of West 65th Street to the property of the People's Packing Company located along the westerly side of West 63rd Street and in connection with that ordinance there were certain transfers of right-of-way conveyed
450 to the Big Four Railroad and I will have to ask Mr. Cobbe to recite that for you.

By Mr. PIERCE:

Q. Will you indicate on Exhibit No. 12, Mr. Cobbe, just what right-of-ways were transferred here or caused to be transferred by Swift & Company to the railroad company in 1910?

A. Swift & Company's conveyance was from Henry C. Thom, dated June 7, 1911, across lots 164, 165, 151, 152, 153, and 154.

Q. Now, the portion of the track leading to the present Swift & Company's plant as shown on Exhibit No. 12 is indicated by what color across these sublots which you just named?

A. Shown in green.

Q. Now, can you state where the right-of-way was procured for the track immediately east of West 65th Street?

A. The right-of-way across Lot 166 was secured from the Cleveland Union Stock Yards Company under date of May 11, 1911, shown in yellow on the map.

Q. Now, will you state, please, when the right-of-way was obtained and am I stating it correctly that it is a sixteen-foot right-of-way?

A. Sixteen-foot right-of-way.

Q. Beginning at sublot 255 along the westerly side of West 63rd Street and extending north to lot 285, will you state when that was obtained, and by what means of conveyance?

A. That right-of-way was obtained by two easements;
451 one from the Theurer Norton and others under date of March 18, 1908, and the other from Henry C. Thom, et al., under date of March 19, 1908, for conveying whatever rights they had in the sixteen-foot right-of-way across lots 255 to 285 on the westerly side of West 63rd Street.

Q. Now, Mr. Cobbe, did you also find a proceeding which had been had in Common Pleas Court between the Cleveland Union Stock Yards Company and the Cleveland Provision Company?

A. I did.

Q. Will you state if you found any connection with that proceeding that a deed had been given by the Cleveland Union Stock Yards Company to the Cleveland Provision Company on July 14, 1916?

A. It had.

Q. And in addition to seven and three-quarters acres of land which the Cleveland Union Stock Yards Company conveyed to the Cleveland Provision Company at that time, what if anything did that deed provide with reference to a right-of-way of the Cleveland Provision Company to the Big Four?

A. That deed provided in addition to the conveyance of the seven and three-quarters acres, that sixteen-foot right-of-way to be later described and conveyed extending from the Cleveland Provision Company property to a connection with the Big Four Railway, the location at that time being indefinite.

452 Q. Now, the property referred to then as the Cleveland Provision Company is indicated on Exhibit 12 now as the property of what company?

A. Earl C. Gibbs.

Q. At the time that the deed was given by the Stock Yards Company to the Cleveland Provision Company, July 14, 1916, did you also find in the Common Pleas Court record Case No. 444,923, and Cuyahoga County, Court of Appeals Case No. 15727, a copy of an agreement made between the Cleveland Union Stock Yards Company and the Cleveland Provision Company dated July 14, 1916?

A. An agreement of sale; yes.

Q. Agreement of sale. Do you have copies of those with you, Mr. Cobbe?

A. No; I have not.

Q. Now, in this Common Pleas Court action which was filed by the Cleveland Union Stock Yards Company on May 13, 1936, did your examination of the records show that that action was appealed to the Court of Appeals?

A. Yes.

Q. Will you state please just what the proceedings in that case involved, Mr. Cobbe?

A. In 1935 or 1936, the Cleveland Provision Company went through bankruptcy and at that time the Cleveland Trust Company took steps to clear the cloud which was then existing on the land. By means of this agreement to sell a deed——

453 Q. You said the Cleveland Trust Company?

A. The Cleveland Provision Company.

Q. You said Cleveland Trust.

A. I meant the Cleveland Provision Company went into bankruptcy and the Cleveland Union Stock Yards filed a suit to clear up this cloud on the title due to the fact that they had issued a deed and agreement to convey a sixteen-foot strip.

Q. Well, go ahead and relate what happened in that action as the record indicated when you read it; will you please, Mr. Cobe?

A. Well, this—the petition of the Cleveland Union Stock Yards Company was dismissed and they appealed the dismissal and the appeal—the verdict on the appeal was also dismissed, and the Cleveland Union Stock Yards Company were ordered to prepare a deed and convey the sixteen-foot strip of land to Irving Kane, trustee, in the Cleveland Provision Company bankruptcy case.

Q. When you speak of "bankruptcy," you refer to Section 77-B proceedings?

A. 77-B.

Q. Now, I hand you what is entitled here "Grant of right-of-way," and ask you if that is the deed—I am coming back to this for identification in a moment—if that is a copy of the deed which the Cleveland Union Stock Yards gave to the Cleveland
454 Provision Company in connection with the litigation in 1936 in Common Pleas Court and Court of Appeals, which we have just been discussing [indicating]?

A. It is.

Q. And did you find that deed recorded in the records of Cuyahoga County?

A. Yes, sir. It is recorded in Volume 4666, page 610.

Q. What is the date of that deed, please?

A. November 24, 1936.

Q. Did you also find the deed, Trustee's deed given by Irving Kane in connection with this Cleveland, former Cleveland Provision Company property and the right-of-way which you just referred to?

A. I did.

Q. Will you tell us the date on which the Trustee's deed was recorded, the date of the deed, and that date it was recorded, if you have it?

A. The date of the deed is February 16, 1937, and the recording data is Volume 4701, page 129.

Q. In connection with the deed dated November 24, 1936, from the stockyards to Irving Kane, trustee, will you state what right-of-way was conveyed in that deed to the trustee by the Stock Yards Company and the route that right-of-way takes on Exhibit No. 12, the route it follows?

A. Did you want me to read the description, or just follow it in the general direction?

455 Mr. Pierce. I would like to have just a moment. I would like to supply copies of those four documents to be marked as Exhibits later and will supply them ten days later.

Exam. HADEN. Off the record, please.

(Discusison had outside the record.)

A. The general description is at the beginning point of the south line of the Big Four Railroad about four hundred feet westerly of the——

By Exam. HADEN:

Q. What are you pointing out?

A. I am pointing to the south right-of-way line of the Big Four Railway. The description is the center line description of the sixteen-foot easement. There is an angle in a southwesterly direction about 160 feet to a clearance point with this, with the Wheeling-Lake Erie right-of-way; thence following the Lake Erie right-of-way about one thousand feet to a point in here, in this vicinity, and then on a curve with one hundred-foot chords, a circular distance curving to the south and back to the east and clearing this property as shown on the map as the Rollercade, Incorporated, designated in the description as the Equestrium, and thence easterly to a point on the north line of the Cleveland Provision Company.

By Mr. PIERCE:

Q. Now, Mr. Cobbe, was the same sixteen-foot right-of-way which you have just described here, given by the Cleveland
456. Union Stock Yards Company to the trustee of the Cleveland Provision Company in 1936 the same right-of-way route which was included in the 1916 deed from the stockyards to the Cleveland Provision Company?

A. I can't say for certain, but I think the 1916 deed had no metes and bounds description. They agreed to convey a sixteen-foot right-of-way. They conveyed the right-of-way in the deed, but it was agreed to convey it by a later deed with metes and bounds.

Q. In the trustee's deed, Irving Kane, trustee, the Earl C. Gibbs Company, dated February 16, 1937, is that same right-of-way conveyed by the trustee, Earl C. Gibbs Company?

A. Yes.

Q. It is over the same route toward the west and north and back to the east to connect with the Big Four right-of-way at the north end of the stockyards property?

A. Yes.

Mr. PIERCE. Now, to simplify this thing, if I may, I should like permission here to supply copies of the Ordinance No. 10944 of May 25, 1908; Ordinance No. 18748 of September 6, 1910; the deed of November 24, 1936 from the stockyards to the trustee of the Cleveland Provision Company; the trustee's deed of February

16, 1937 to Earl C. Gibbs Company; a copy of the agreement between the Cleveland Union Stock Yards Company to the Cleveland Provision Company, dated July 14, 1916, and a copy of the deed from the Cleveland Union Stock Yards Company
457 to the Cleveland Provision Company dated July 14, 1916.

Exam. HADEN. Any objection to Mr. Pierce furnishing the documents he just described at the close of the hearing? (No response.) Let the record show no objection.

Mr. Pierce, can you furnish the documents described within fifteen days?

Mr. PIERCE. Yes.

Mr. RYNDER. I assume that I will get a copy.

Exam. HADEN. You will furnish copies to all parties of record and three copies to the Commission; that is, all documents furnished subsequent to the hearing.

By Mr. PIERCE:

Q. Mr. Cobbe, will you tell me if the Court of Appeals, Case No. 15727, which was an appeal of Common Pleas Court No. 444923, what the docket showed the entry was that disposed of that case?

A. "November 24, 1936 to court, settled and dismissed; each party to pay one-half of the costs for which judgment is rendered; mandate to issue; journal 11, page 547."

Q. Will you also tell us what journal 11, page 547 shows?

A. "Case No. 15727, Cleveland Union Stock Yards Company versus Cleveland Provision Company; appeal by the Cleveland Union Stock Yards Company, law and fact. This case is settled and dismissed and by agreement each party to pay one-half the costs, for which judgment is rendered against them.
458 Whereupon court convened and adjourned from time to time until November 27, 1936."

Mr. PIERCE. May I have just a moment, please?

Exam. HADEN. Yes.

Mr. PIERCE. I think you may inquire.

Mr. RYNDER. No questions.

EXAMINATION BY EXAMINER

By Exam. HADEN:

Q. Mr. Cobbe, as I understand your testimony as it has related to trackage other than that owned by the Cleveland Union Stock Yards Company so-called, I believe it has been referred to here as a sidetrack. Anyway, the track that is used by the New York Central in reaching the plant of Swift & Company. Are you familiar with any agreements, either oral or written or by cor-

respondence in any way or other as to the use of that portion of the track?

A. No, sir.

Q. Would any agreements, if any, were made, come under the supervision of your office?

A. No, sir; unless it was—well, I don't know.

Q. You understand the portion of the track to which I have reference?

A. I think you have reference to this track on West side of 65th Street.

Q. Yes.

A. Not necessarily so; I would say there is a possibility
459 that it might, but more likely it wouldn't.

Exam. HADEN. Any further questions of Mr. Cobb?

Mr. PIERCE. I think not.

Mr. BAKER. Mr. Examiner, may I have one question?

Exam. HADEN. Mr. Baker.

By Mr. BAKER:

Q. You stated that a portion of the right-of-way between points G and H on Exhibit No. 12 had been obtained from the Cleveland Union Stock Yards Company. Could you tell me by what form of document that was obtained; that is on the easterly side of West 63rd Street?

A. "To grant unto the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, a corporation, grantee, its successors and assigns an easement for the construction, operation, and maintenance of a railroad track in and over the following real estate——

Q. What is the date of the deed?

A. May 11, 1911.

Q. By whom was it made?

A. You mean who signed it?

Q. Yes.

A. Signed by "John F. Whitlaw, President" and "Allen F. Wallace, Secretary."

By Mr. RYNDER:

Q. Of what? Cleveland Union Stock Yards Company?

A. Cleveland Union Stock Yards Company.

By Mr. BAKER:

Q. May 18, 1911?

460 A. May 11th; I have here, May 11, 1911.

Mr. BAKER. Thank you.

Mr. PIERCE. Just one more thing while the witness is on the stand, Mr. Examiner, I would also like leave to submit a map

showing this right-of-way from the Cleveland Provision Company to the Big Four main tracks, which was conveyed by the stockyards to the Cleveland Provision Company. It is not indicated on any map here, and I would like to submit a map showing that route, if we might.

Mr. RYNDER. That is agreeable. That right-of-way is not operated by a railroad switch track.

Mr. PIERCE. I don't understand that it is.

Exam. HADEN. Any further questions of Mr. Cobbe?

Mr. PIERCE. No, sir.

Exam. HADEN. No questions of you, Mr. Cobbe. You may be excused, thank you. (Witness excused.)

Mr. Pierce, before we go ahead, let me ask you, in addition to the ordinance and the documents which you have just described, there is one other prior document.

Mr. PIERCE. It was ordinance No. 18944 and Ordinance No. 18748.

Exam. HADEN. Isn't that 10944?

Mr. PIERCE. 10944; I beg your pardon. Do you want to check the rest of them?

Exam. HADEN. Before you offered to submit those
461 after the hearing, there were a few other documents prior to that time.

Mr. PIERCE. I have the photostat on 11-A which is the one which was to be a photostatic copy, Mr. Rynder, of that sketch.

Exam. HADEN. You are putting that in as an exhibit. Who discussed that exhibit?

Mr. PIERCE. This exhibit went along with the stipulation which was put in Exhibit 11; that was to be 11-A.

Exam. HADEN. This is part of Exhibit 11.

Mr. PIERCE. I would like to put this original in on Exhibit 11.

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record.

You may proceed, Mr. Pierce.

Mr. PIERCE. Mr. Shaner, will you take the chair, please?

L. N. SHANER was sworn and testified as follows:

Direct examination by Mr. PIERCE:

Q. Will you give us your name, please?

A. L. N. Shaner.

Q. What is your position with the New York Central?

A. Chief Clerk of the Law Department.

462 Q. Mr. Shaner, have you in your duties as chief clerk made an investigation to obtain various contracts, let-

ters, and papers in connection with the Swift & Company complaint in Docket 28714?

A. Yes, sir; I did a very full investigation.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 14."

(Exhibit No. 14, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I will hand you what has been marked for the purpose of identification as "Exhibit No. 14," a contract dated May 10, 1899 between the Big Four, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and the Cleveland Union Stock Yards Company, and will you state if that is a copy of the agreement, original agreement as you found it in the files, or as it was reported to you as being in the files of the Big Four Railroad [indicating]?

A. That is correct; yes, sir.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 15." [indicating].

(Exhibit No. 15, Witness Shamner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 15," and I will ask you to tell us what that exhibit covers.

A. Sidetrack agreement dated March 17, 1938 between
463 the New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, the Standard Beef Company, and the Cleveland Union Stock Yards Company.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 16," [indicating].

(Exhibit No. 16, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I will ask you to describe this exhibit.

A. That is a sidetrack agreement between the C. C. C. & St. L. Railway Company, Kallem Kreinburg, and William A. Krasny, dba Kreinburg and Krasny, and the Cleveland Union Stock Yards Company. The exhibit also contains an assignment of the agreement dated July 7, 1943 from Kallem Kreinburg and William A. Krasny, dba Kreinburg and Krasny to Kreinburg and Krasny, Inc.

It also indicates the application and consent dated July 7, 1943 of Kreinburg and Krasny, Inc. for permission to allow use of said track by United States Coast Guard, Commissary Supply

Depot, and consent of the New York Central Railroad Company to such use of track.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 17," [indicating].

(Exhibit No. 17, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 17," and I will ask you to describe this exhibit [indicating].

464 A. This exhibit is a sidetrack agreement dated October 1, 1937, between the New York Central Railroad Company, lessee of the C. C. C. & St. L. Railway, Earl C. Gibbs, Inc., and the Cleveland Union Stock Yards Company.

There is also connected with it an application and consent for permitting use of the track by the Hansol Packing Company, which was consented to by the Cleveland Union Stock Yards Company. It also covers use by two other industries.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 18" [indicating].

(Exhibit No. 18, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 18," and I will ask you to describe it [indicating].

A. This is a copy of an agreement, sidetrack agreement, dated November 25, 1916, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Swift & Company.

Mr. PIERCE. May I go off the record here just a moment, please?

Exam. HADEN. Off the record.

(Discussion had outside the record.)

Exam. HADEN. Mr. Pierce, we were off the record. Will you restate it?

Mr. PIERCE. We would like permission of the Examiner
465 and the parties to this action to submit a blueprint which accompanied Exhibit No. 18, being the agreement of November 25, 1916, between the C. C. C. & St. L. Railway Company and Swift & Company, the blueprint showing the tracks covered by that agreement,

Exam. HADEN. There being no objection, it may be supplied within fifteen days of the hearing and you will clearly indicate, Mr. Pierce, that it is to be——

Mr. PIERCE. Attached to Exhibit 18.

Exam. HADEN. To be attached to Exhibit 18.

Mr. PIERCE. All right, sir.

I would like to have this marked for the purpose of identification as "Exhibit No. 19."

(Exhibit No. 19, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 19," and I will ask you to describe it [indicating].

A. It is a sidetrack agreement between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and Henry C. Thom, doing business under the firm name of People's Packing Company of Cleveland, Ohio, dated October 27, 1910.

Q. Is that a cancelled contract, one which is not now in effect?

A. It is no longer in effect, that's right.

Mr. PIERCE. I would like to have marked for the purpose of identification this as "Exhibit 20" [indicating].

(Exhibit No. 20, Witness Shaner, marked for identification.)

466 By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 20," and I will ask you to describe it [indicating].

A. This sidetrack agreement is dated May 25, 1912, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Henry C. Thom, doing business as the People's Packing Company of Cleveland, Ohio.

Q. And is this contract in effect?

A. It is no longer in effect.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 21" [indicating].

(Exhibit No. 21, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 21," and I will ask you to describe this document [indicating].

A. It is a sidetrack agreement between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the Federal Packing Company and it should be dated March 28, 1927, and also a letter dated May 5, 1931, indicating an agreement of March 28, 1927, superseded by agreement dated November 24, 1930.

Q. And this Exhibit 21 is not now in effect?

A. It is no longer in effect.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 22" [indicating].

467 (Exhibit No. 22, Witness Shaner, marked for identification).

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as Exhibit 22, and I will ask you what that is [indicating].

A. This is a sidetrack agreement dated November 24, 1930, between the New York Central Railroad Company and the Federal Packing Company, and also contains as assignment by the Federal Packing Company to Swift & Company dated April 2, 1938.

Mr. PIERCE. Now, at this point, Mr. Rynder, are you willing to stipulate that the Henry C. Thom, doing business under the firm name of People's Packing Company, named in the exhibits 19 and 20, were the predecessors of Swift & Company?

Mr. RYNDER. I think I am willing to stipulate what you want, but I don't think that is exactly the fact. I think Henry C. Thom simply continued to manage the plant after it had been bought by the Swift & Company. I think we purchased the plant in 1905.

Mr. PIERCE. Well then, your stipulation is that he was the agent for Swift & Company.

Mr. RYNDER. That he was the authorized agent for Swift & Company.

Mr. PIERCE. And in Exhibit 21 and 22 referring to the Federal Packing Company, that the Federal Packing Company was a predecessor of Swift & Company?

Mr. RYNDER. Yes, sir.

468 Mr. PIERCE. All right. I would like to have this marked for the purpose of identification as "Exhibit No. 23" [Indicating].

(Exhibit No. 23, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 23" and I will ask you to describe it [indicating].

A. It is a sidetrack agreement dated March 28, 1927, between the Cleveland, Cinicinnati, Chicago and St. Louis Railway Company, first party, and Hughes Provision Company, second party.

Q. Now in effect?

A. That's right.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 24" [indicating].

(Exhibit No. 24, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 24," and I will ask you to describe it [indicating].

A. It is a sidetrack agreement dated August 1, 1922, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Koblenzer Brothers.

Q. Which is now in effect?

A. That's right.

469 Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 25" [indicating].

Q. I will hand you what has been marked for the purpose of identification as "Exhibit No. 25," and I will ask you to describe it [indicating].

(Exhibit No. 25, Witness Shaner, marked for identification.)

A. It is a sidetrack agreement dated November 27, 1916, between The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the Theurer Norton Provision Company.

Q. This contract is no longer in effect?

A. That is correct.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 26" [indicating].

(Exhibit No. 26, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 26," and I will ask you to describe it [indicating].

A. It is a sidetrack agreement dated March 15, 1917, between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company as first party, and the Theurer Norton Provision Company as the second party, and Swift & Company as the third party.

Q. And this agreement is no longer in effect?

A. That is correct.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 27" [indicating].

470 (Exhibit No. 27, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. Handing you what has been marked for the purpose of identification as "Exhibit 27," I will ask you to describe it [indicating].

A. It is a sidetrack agreement dated January 22, 1934, between the New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, and Theurer Norton Provision Company.

Q. This agreement is now in effect?

A. That is right.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 28" [indicating].

(Exhibit No. 28, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 28," and I will ask you to describe that document [indicating].

A. It is a sidetrack agreement dated May 14, 1934, between the New York Central Railroad Company, lessee, of the Cleveland, Cincinnati, Chicago and St. Louis Railway, and Theurer Norton Provision Company, and Swift & Company.

Q. And is this agreement now in effect?

A. It is. It also contains a supplemental agreement dated February 19, 1935, between the same parties.

471 Mr. PIERCE. Mr. Examiner, if I might do so, I should like to introduce at this time one of the documents which we asked a while ago to introduce later, and that is ordinance 18748–A of 1910. We do have a copy of it now.

Exam. HADEN. It will be marked as "Exhibit No. 29."

(Exhibit No. 29, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 29" and ask you if this is a copy of Ordinance 18748–A, which has been referred to in the trial here [indicating]?

A. It is; yes, sir.

Q. Mr. Shaner, you have heard reference made to easements granted to the Big Four Railroad providing for a sixteen-foot strip right-of-way in order to serve Swift & Company's plant located easterly of West 65th and westerly of West 63rd Street. I hand you what will be marked for the purpose of identification as "Exhibit No. 30" and will ask you to tell us—to describe this document [indicating].

(Exhibit No. 30, Witness Shaner, marked for identification.)

A. This exhibit contains easements which were granted from the Blumenstock & Reid Company; Henry C. Thom, et al.; Theurer Norton Provision Company, et al.; Henry C. Thom, et al., to the Cleveland Union Stock Yards Company and H. C. Thom, et al., all to the C. C. C. & St. L. Railway Company, granting the sixteen-foot easement required in order to reach and
472 serve predecessors of the present Swift & Company plant located easterly of West 65th Street and westerly of West 63rd Street.

Mr. PIERCE. I would like to have marked for the purpose of identification this document as "Exhibit No. 31."

(Exhibit No. 31, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 31" and I will ask you to describe that document [indicating].

A. It is a letter dated December 31, 1934, written by A. Z. Baker, president and general manager of the Cleveland Union Stock Yards Company to Mr. C. M. Williams, superintendent of the New York Central Railroad Company, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 32" [indicating].

(Exhibit No. 32, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 32," and I will ask you to describe it [indicating].

A. It is a letter dated January 11, 1935, written by A. Z. Baker, president and general manager of the Cleveland Union Stock Yards Company to Mr. C. M. Williams, superintendent of the New York Central Lines, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit 33" [indicating].

473 (Exhibit No. 33, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 33," and I will ask you to describe that document [indicating].

A. It is a letter dated October 6, 1938, written by F. S. Risley, Assistant Vice President and General Manager of the New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company, to the Standard Beef Company, Cleveland, Ohio.

Q. Is that in connection with modifying sidetrack agreement of March 17, 1938?

A. That carries a form of modification dated October 15, 1938, which was executed on behalf of the Standard Beef Company.

Q. On the date of October 15, 1938?

A. On the date of October 15, 1938.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 34" [indicating].

(Exhibit No. 34, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 34," and ask you if that is the same type

of document as was Exhibit No. 33, but addressed to Kallem Kreinburg and William A. Krasny, copartners, doing business as Kreinburg & Krasny in connection with modifying its sidetrack agreement?

474 A. That is right.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 35" [indicating].

(Exhibit No. 35, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 35" and ask you if that is the same type of document as Exhibit No. 33, but addressed to Earl Gibbs, Incorporated, in connection with its sidetrack agreement dated October 1, 1937 [indicating]?

A. That is correct.

Q. And is there an acceptance of this Earl C. Gibbs modification?

A. Yes. It is, but I have blank 1938, no date.

Q. That is, the actual date is not given?

A. No.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 36" [indicating].

(Exhibit No. 36, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 36" and ask you if that is the same type of document as Exhibit No. 33, but addressed to Swift & Company, regarding the modification of its sidetrack agreement of November 24, 1930 [indicating]?

A. That is correct.

Mr. PIERCE. I would like to have you mark this for
475 the purpose of identification as "Exhibit No. 37" [indicating].

(Exhibit No. 37, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 37" and ask you to describe that document [indicating].

Mr. RYNDER. Just to save time later on, as to Exhibit 36, that shows no averment of Swift & Company?

WITNESS. No acceptance.

Mr. RYNDER. Thank you.

A. It is a letter dated November 22, 1938, from F. S. Risley, Assistant Vice President and General Manager of the New York

Central Railroad Company, to Swift & Company at Cleveland.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 38" [indicating].

(Exhibit No. 38, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 38," and I will ask you to describe it [indicating].

A. It is a letter dated December 2, 1938, written by Swift & Company, per J. H. H. to F. S. Risley, Assistant Vice President of the New York Central Railroad Company, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 39" [indicating].

(Exhibit No. 39, Witness Shaner, marked for identification.)

476 By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 39," and I will ask you to describe that document [indicating].

A. It is a letter dated January 6, 1939, written by F. S. Risley to Swift & Company, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 40" [indicating].

(Exhibit No. 40, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I will hand you what has been marked for the purpose of identification as "Exhibit No. 40," and I will ask you to describe that document [indicating].

A. It is a letter dated January 30, 1939, written by Swift & Company, per J. H. H. to F. S. Risley, Assistant Vice President, New York Central Railroad, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 41" [indicating].

(Exhibit No. 41, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. Handing you what has been marked for the purpose of identification as "Exhibit No. 41," I will ask you if it is the same type of document as Exhibit No. 33 except that it is addressed to the Hughes Provision Company, pertaining to its sidetrack agreement of March [indicating]?

A. It is.

Mr. PIERCE. I would like to have this marked for
477 the purpose of identification as "Exhibit No. 42" [indicating].

(Exhibit No. 42, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 42," and I will ask you to state if that is the same type of document as Exhibit No. 33, but is addressed to Christian Koblenzer and Matthias Koblenzer, doing business as Koblenzer Brothers and referring to a sidetrack agreement of August 1, 1922 [indicating]?

A. That is correct.

Q. Was there an aceptance indicated on that modification?

A. Yes; it was accepted November 18, 1938.

Mr. PIERCE. I would like to have marked for the purpose of identification this paper as "Exhibit No. 43" [indicating].

(Exhibit No. 43, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. Handing you what has been marked for the purpose of identification as "Exhibit No. 43," I will ask you if that is the same type of document as Exhibit No. 33, except that it is addressed to Theurer Norton Provision Company and Swift & Company, and pertains to the sidetrack agreement of May 14, 1934 [indicating].

A. That is correct.

Mr. PIERCE. I would like to have marked for the purpose of identification this document as "Exhibit No. 44."

478 (Exhibit No. 44, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 44" and will ask you to describe that document [indicating].

A. It is a letter dated November 11, 1938 from the Theurer Norton Provision Company by August F. Lucht, Secretary, and addressed to F. S. Risley, Assistant Vice President and General Manager of the New York Central Railroad Company, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 45" [indicating].

(Exhibit No. 45, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 45," and ask you if that is the same type of document as Exhibit No. 33, except it is address to the Theurer Norton Provision Company, and referring to its sidetrack agreement of January 22, 1934 [indicating]?

A. It is the same type of letter except it is dated November 29, 1938.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 46" [indicating].

(Exhibit No. 46, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of
479 identification as "Exhibit No. 46," and I will ask you to describe this document [indicating].

A. It is a letter dated November 18, 1938 from Koblenzer Brothers, per E. Galbraith to the Interstate Commerce Commission, Washington, D. C.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 47" [indicating].

(Exhibit No. 47, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit 47," and I will ask you to describe it [indicating].

A. It is a letter dated November 26, 1938 from W. P. Bartel, Secretary, Interstate Commerce Commission, to F. O. Stafford, freight traffic manager, New York Central System, Cleveland, Ohio.

Mr. PIERCE. I would like to have this marked for the purpose of identification as "Exhibit No. 48" [indicating].

(Exhibit No. 48, Witness Shaner, marked for identification.)

By Mr. PIERCE:

Q. I hand you what has been marked for the purpose of identification as "Exhibit No. 48," and I will ask you to describe this document [indicating].

A. It is a letter dated December 6, 1938 from F. O. Stafford, freight traffic manager, New York Central Railroad Company, Cleveland, Ohio, to W. P. Bartel, Secretary, Interstate Commerce Commission, Washington, D. C., to which is attached Ex-
480 hibits A and C, both being letters, one bearing the date of December 31, 1934 and the other January 11, 1935.

Mr. PIERCE. May we be off the record, please, Mr. Examiner?

Exam. HADEN. Off the record.

(Discussion had off the record.)

Exam. HADEN. On the record.

Mr. PIERCE. I think that is all. At this time we offer these exhibits in evidence.

Exam. HADEN. Exhibits 14 to 48, both inclusive, by Witness Shaner, have been offered, and if there is no objection, they will be received in evidence. Let the record show no objection is noted, and they may be received.

(Exhibits 14 to 48, Witness Shaner, received in evidence.)

Mr. PIERCE. Mr. Examiner, at this time I would like to offer a stipulation here, which Mr. Rynder is agreeable to, as I understand. This stipulation covers the testimony of Mr. Pearson F. Marsh, Special Agent of the Interstate Commerce Commission, in Ex Parte No. 127 hearing, July 29, 1939, in which he stated in the record, pages 824, 825 the statements made in this stipulation, and after quoting Mr. Marsh's testimony, there is a further description of carrying through to the conclusion of the ownership of stock by Swift & Company into the Cleveland Union Stock Yards Company, terminating in 1936, and I would suggest
481 that the reporter copy the whole thing into the record if it is agreeable.

Exam. HADEN. Instead of an exhibit?

Mr. PIERCE. Whatever you prefer, Mr. Examiner. An exhibit is all right with us, Mr. Examiner.

Exam. HADEN. I think it will serve the same purpose as an exhibit. If there is no objection to that being stipulated in the record, the statement just referred to, by Mr. Pierce, extract of testimony of Witness Special Agent Marsh, it may be received as Exhibit 49.

(Exhibit 49, marked for identification and received in evidence.)

Mr. PIERCE. My Rynder, I understand in your statement this morning you were willing to concede that there were sixty-day terminating clauses in all of the sidetrack agreements?

Mr. RYNDER. Yes, sir.

Mr. PIERCE. May we be off the record, please, Mr. Examiner?

Exam. HADEN. Off the record.

(Discussion had off the record.)

Exam. HADEN. On the record. Mr. Pierce, have you any witnesses available that could give the Commission any information as to what arrangements the railroads would make for the delivery of livestock in the Cleveland area if and when the Livestock Terminal Service Company discontinues the loading and
482 unloading, assuming that is not continued, that service, by the Cleveland Stock Yards Company.

Mr. PIERCE. Mr. Examiner, I might say that we don't have present a witness who could answer that question now. There has been a joint petition filed in Docket 28421 to review the cost picture for the loading and unloading service at the Cleveland Union Stock Yards, and as far as I know, at this time, there has been no arrangement made for the loading and unloading at the end of the sixty days or on or about August 19th. There is in progress, and we have had one or two discussions with Mr. Baker on it, negotiations looking toward some solution of the situation at the stockyards.

Exam. Haden. How about with the Livestock Terminal Service Company, have you had any conference with them as to continuing this service?

Mr. Pierce. The Livestock Terminal Service Company joined with the railroad company in this petition in 28421 to reopen it as to the cost study there.

Exam. Haden. I will ask you this question: In connection with the petition for postponement, which the New York Central and certain other rail carriers filed in Finance Docket No. 14038, the reply of the applicant, the Livestock Terminal Service Company stated that the Applicant is insolvent and simply without means of credit to pay its employees or its other charges after
483 June 19, 1944; that is the effective date of this abandonment of its supplemental tariff.

On last Monday I learned that the tariffs of the Service Company had been postponed sixty days. I will ask you, if you know, whether the railroads in any way agreed to make up any difference that the Livestock Terminal Service Company might lose or losses they may incur, of any portion of the loss they may incur in the next sixty days.

Mr. Pierce. The railroad companies did not agree to anything in any manner other than may be set forth in the petition to reopen 28421.

Exam. Haden. I will ask you that question because the third paragraph of that petition clearly indicates that the Livestock Terminal Service Company could not possibly go beyond June 19th, and yet almost overnight they find some means to continue for the sixty days. I wonder if any gentlemen here would be in a position to tell the Commission how that is being done. I appreciate we have no witnesses from the Livestock Terminal Service Company, but in view of the importance of the matter, I think the Commission would like to be advised.

Mr. Fitzpatrick. Mr. Examiner, the petition filed in 28421, Sub 1, to review the charge for loading and unloading, sets forth that the Service Company has approved some arrangement with the Stock Yards Company that will enable it to continue operations for a limited period.

The railroads say in that petition that they will
484 continue to pay $1.25 per deck, but they do agree in the petition to readjust the charge on shipments handled on June 19, 1944, and thereafter to correspond with the Commission's findings, but the railroads have made no commitment to underwrite any deficit during this period from June 19, 1944 and thereafter.

Exam. Haden. I will ask Mr. Baker if you contemplate putting on a witness in this case?

Mr. BAKER. Mr. Examiner, if you care for me to do so, I will be glad to take the stand and maybe we can clear up a few points.

Exam. HADEN. I believe the Commission would like to have the information. It is an important matter and I think it is a very opportune time for the Commission to be given what data is available. If you do that, I will ask you to withhold your testimony until the railroads have completed their case and Mr. Rynder any rebuttal testimony.

Mr. RYNDER. Mr. Examiner, I simply wanted to make an objection, with the utmost deference to the Examiner, with respect to the complaint in 28714 which is not at all important what may happen in the abandonment case. We don't care, so far as our case is concerned, whether the unloading in the stockyards is continued by the Stock Yards Company or the railroad. In any event our livestock would be unloaded in the stockyards and we would have to pay yardage charge to get it out, and that is the situa-
485 tion we are complaining of. I am not concerned with the things you are asking about, and I don't think they have a part in this case.

Exam. HADEN. Of course, Mr. Rynder, in the event no agreement is reached, no determination made or some means found for the railroad to serve your plant in Cleveland, and if loading and unloading of livestock would discontinue at the public stockyards, it would leave you without any rail——

Mr. RYNDER. I imagine we would have to bring it all in by truck.

Exam. HADEN. So, I will ask Mr. Baker later on if he will give the Commission whatever information he has available. Anything further, Mr. Pierce?

Mr. PIERCE. I think outside of the report from the engineers on the dimensions of the stock pens out there, that is all.

Exam. HADEN. Well, we will take a recess for ten or fifteen minutes.

Mr. PIERCE. And if Mr. Baker goes on the stand, we want to ask him a few questions.

Exam. HADEN. All right. We will recess now.

(Recess had.)

Exam. HADEN. Come to order please, gentlemen.

Mr. PIERCE. I would like to recall Mr. Cobbe.

Exam. HADEN. When you are ready to proceed, you may.

486 RICHARD C. COBBE, having been previously sworn, was recalled, and testified as follows:

Direct examination (resumed) by Mr. PIERCE:

Q. Mr. Cobbe, in Mr. Pastor's testimony, he referred to the section of the stockyards track No. 10, which is indicated in yellow

print on Exhibit No. 12; that that track passed over the property of the Standard Beef Company from point C to C–1 and the property of Kreinburg & Krasny from point C–2 to point D–1 and from point D to F. Will you state for the record whether or not that is a correct statement, or can you correct it so that we may have the record show the correct situation here?

A. Both the properties of the Standard Beef Company and Kreinburg & Krasny were conveyed by the Cleveland Union Stock Yards Company at different times. In those deeds the Cleveland Union Stock Yards Company excepted and reserved from those premises a right-of-way from the railroad switch tracks crossing the premises. It is now located or hereafter changed or relocated.

Mr. PIERCE. That is all. I just wanted to get that correction in the record, Mr. Examiner, and I would like to state at this time that during the recess Mr. Rynder and I discussed this question of the area of the pens inside of the Swift & Company's plant, and we would prefer, if the Examiner is agreeable, to have the
487 engineers of Swift & Company, and the New York Central agree on the dimensions and submit a blueprint which will set forth the accurate dimensions as to the pens and the location of the pens on the property; is that right, Mr. Rynder?

Mr. RYNDER. That is correct.

Exam. HADEN. That will be furnished at the same time the other documents will be furnished the Commission within fifteen days?

Mr. PIERCE. Yes, sir.

Exam. HADEN. And what will be the title or character of the exhibit?

Mr. PIERCE. I suppose—let us say size and location of stock pens on Swift & Company's property; is that the way you want that?

Mr. RYNDER. Some way or another, whichever way you describe it. I understand very roughly it will be a blueprint of the pen area of pens, and then the dimensions.

Mr. PIERCE. That is right.

Exam. HADEN. Gentlemen, the supplemental document that will be furnished will be given Exhibit numbers and you will be notified of the numbers assigned to them.

Mr. PIERCE. The only other thing I haven't noted at this time—perhaps Mr. Rynder will introduce it—is the March 19, 1908 agreement to which Mr. Ford testified this morning.

488 Mr. RYNDER. Wasn't that part of your exhibits?

Mr. PIERCE. March 19, 1908?

Mr. RYNDER. May we be off the record, please, Mr. Examiner.

Exam. HADEN. Off the record, please.

(Discussion had outside the record.)

Exam. HADEN. On the record.

Mr. RYNDER. Mr. Examiner, Mr. Pierce inquired about that agreement, about that March 19, 1908 agreement, and it is so short, rather than defer it and have it copied, I think Mr. Ford could read it into the record right here, but I also question as to whether I was going to put him on back for rebuttal, but I think all the evidence of the defendants should go in before I put him back on.

EXAM. HADEN. I understood you to say, Mr. Pierce, that all your evidence is in?

Mr. RYNDER. I understood Mr. Baker was going on.

Mr. PIERCE. Except for the few questions that I want to ask Mr. Baker.

Mr. RYNDER. The Cleveland Union Stock Yards is a defendant.

EXAM. HADEN. Is a defendant; yes. All right, Mr. Baker.

A. Z. BAKER was sworn and testified as follows:

489 EXAMINATION BY EXAMINER

By Exam. HADEN:

Q. Mr. Baker, do you have any statement that you wish to make for the record?

A. My name is A. Z. Baker. I am President of the Cleveland Union Stock Yards Company, and I have been in that capacity since 1925.

It has been charged in this proceeding, and I don't know whether that claim is being still maintained or not, that the Cleveland Union Stock Yards Company is a common carrier by railroad and subject to the Interstate Commerce Act. I should like to say that the company was not incorporated for the purpose of engaging in the common carrier business, and insofar as it has been able to, it has not engaged in that business.

As to the track in question in this proceeding, during the last nineteen or twenty years in which I have been connected with the Stock Yards Company, we have at no time considered that that track was dedicated to public use or that it was anything else than a private sidetrack subject to our control, subject to the Stock Yards Company's control under existing contracts with the railroads. We have consistently taken that position in all of our dealings with the railroads or with the packers in connection with that track.

I have made a search of such records as are available in the company and can find nothing to indicate anything different.

That is all I wanted to say, Mr. Examiner. I believe
490 you had some questions that you wanted me to answer.

Q. Mr. Baker, a few moments ago I asked counsel for the

New York Central and also Mr. Fitzpatrick, who, I believe was also present at the time, and also Mr. Pierce, as to whether they knew if any plan had been devised for the railroads to underwrite at least the portion of the Livestock Terminal's alleged deficit in the loading and unloading of livestock for the sixty-day period beyond June 19, 1944, and he stated that the railroads will not in any way make up any of the deficit of the Livestock Terminal Service Company in its operation at the stockyards. I will ask you if the Cleveland Union Stock Yards Company is in any way giving a helping hand to the Livestock Terminal Service Company during this sixty-day period?

A. Mr. Examiner, in furtherance of the Commission's suggestion in the report in finance docket 14038, the parties undertook to work out a solution to the situation, and we have offered to withhold the collection of rent for the two months, it being understood that if the Commission grants an increase in the charges, that the rental charges will be adjusted likewise back to June 19th, and that is the form of help we are giving them during this sixty-day period.

I would like to say also, and perhaps it will answer the doubt that seems to be in your mind: It seems to me that it is inconceivable that that service of loading and unloading livestock would be discontinued. The Stock Yards Company has in-
491 dicated a willingness to make its facilities available for that service at an agreed or arbitrary rental. It has gone further than that. Certainly the mere performance of the loading and unloading, whether it is by the railroads or the service company, or even the Stock Yards Company, there just doesn't seem that there is a possibility that it will be terminated. We have considered, and the Commission has said that the duty of unloading the livestock is the ultimate duty of the line haul carriers. There are a great many reasons why the Stock Yards Company does not want to engage in that business. I think maybe I have answered more than you expected me to.

Q. Then, do I understand your statement to be that the Livestock Terminal Service Company is able to operate for this next sixty-day period because of you withholding the rental charge for the use of the facilities?

A. That is correct. In other words, the Stock Yards Company is underwriting it to the extent of the losses, if any, during this period under an adjusted rate, whatever that might be.

Exam. Haden. I think you, sir. Any question of Mr. Baker?

Mr. Pierce. I would like to ask several, if I may, Mr. Examiner.

Examination by Mr. PIERCE:

Q. Mr. Baker, as president of the Cleveland Union Stock
492 Yards Company, will you state whether or not any officer of Swift & Company has been a director of the Cleveland Union Stock Yards Company between 1916 and 1936?

A. A manager of the Cleveland plant, or a general manager of the Cleveland plant has been, or was continuously from 1916. I think it was in November from sometime in 1936.

Q. That was the Cleveland plant manager of Swift & Company was a director of the Cleveland Union Stock Yards Company during that period?

A. That is correct, and he was elected a director at the request of the President of Swift & Company.

Q. During that period were there several changes in the management so that different parties served as directors from the Swift & Company's plant?

A. There were two changes during that period; the first director was M. T. Morgan, who served from November 2, 1916 to January 17, 1918. W. G. Fletcher, who served from November 7, 1918 to November 2, 1922, and E. W. Phelps, who served from 1922 to April 28, 1936.

Q. Mr. Morgan, Mr. Fletcher, and Mr. Phelps in each instance were the Cleveland managers of the Swift & Company?

A. That is correct.

Q. And on the Board of Directors of the Cleveland Union Stock Yards Company. Did any of these Swift & Company managers serve as a member of your Executive Committee, if you have one?

A. During a part of ths period, between 1916 and 1936
493 there was an Executive Committee and the Board appointed the Committee, and during any such time as there was an Executive Committee, the Swift & Company representative on the Board was a member of the Executive Committee.

Q. Do you know what period that was during the twenty years there from 1916 to 1936 that there was an Executive Committee in existence?

A. No; I can't tell you that.

Q. Was it in the early part of the latter part?

A. I know there was an Executive Committee in 1916, but I don't know how long it continued.

Q. After that?

A. That's right.

Q. Do you know if the records of the Stock Yards Company show that this Swift & Company plant manager was a member of any other committees or activities of the Stock Yards Company's organization?

A. No; I don't recall that he was.

Q. Did you have, or is there, or was there a committee so-called, a Traffic Committee over at the stockyards district of the stockyards and packers on connection with activities in that district?

A. There was a Traffic Committee appointed in 1920. I think it served until 1924, the latter part of 1924.

Q. What was the purpose of that Committee?

494 A. Well, to review traffic matters and improve the service into and out of the yards and to consider matters of a transportation and traffic nature.

Q. Do the Stock Yards Company's records show who the Swift & Company's manager was who was a member of that Committee?

A. The manager was not, but the traffic manager was.

Q. A member of that committee?

A. Yes.

Q. The Traffic Committee consisted of whom, Mr. Baker?

A. The traffic manager of the Swift & Company, traffic manager of the Cleveland Provision Company, and the traffic manager of the Stock Yards Company.

2. Mr. Baker, what meetings, if any, or within your knowledge as having been had with Swift & Company and its officers or representatives in connection with the use of the so-called stockyards track No. 10 in order to reach Swift & Company's plant located over on West 63rd Street?

A. I don't recall anything, Mr. Pierce, other than conversations we have from time to time. I don't think we have had any dealings with them for the use of it. They haven't made any demands upon us and we haven't made any demands upon them. Our dealings have been with the railroads with whom we had contracts.

Q. When you speak of conversations, would you state whether or not those conversations were with some officer or representative of Swift & Company and what if any bearing it had upon

495 the use that the railroad made of the stockyards track in order to reach Swift & Company's plant?

A. Well, I couldn't recall with enough definiteness to testify about it.

Q. When the Swift & Company's manager was a member of the Board of Directors of the Cleveland Union Stock Yards Company, did this manager attend the meetings and take an active part in the operation of the company, so far as you know, or the record shows?

A. The record shows that he was regular in attendance and during the period in which I was connected with the company he took a very active part.

Q. Mr. Baker, are you familiar with the time in 1926 when Swift & Company desired to erect crossing gates and signals over West 65th Street in order to drive the stock from the stockyards to Swift & Company's plant on the east side of West 65th Street?

A. Yes; I recall the matter.

Q. Were there any negotiations at that time, as you recall, with reference to getting over the stockyards track No. 10; that is, with the stock yards company?

A. Mr. Pierce, for some time previous to that Swift & Company had driven their livestock across this track No. 10 across West 65th Street to their plant. These gates were erected simply to confine the livestock as it was being driven across the tracks
496 and across West 65th Street, I don't recall any other negotiations in respect to the gates. I do recall from time to time that we had negotiations or conversations with them with respect to the condition of the crossing where they crossed the tracks.

Q. That is Swift & Company discussed with the Stock Yards Company the question of driving their stock across your track No. 10?

A. That's right.

Q. And at the time the gates were put up in 1926, did Swift & Company handle with you or with the stockyards anything at all in connection with installing crossing gates across your track No. 10, if you recall?

A. I don't recall, Mr. Pierce.

Q. The dealings that you recall are with reference to a paving or getting the stock across the track?

A. That is all I recall.

Q. Was any written contract entered into between Swift & Company and the Stock Yards Company with reference to the question of driving stock across your No. 10 track?

A. Not that I know of.

Q. That was just by conversation; a verbal understanding?

A. It was just egress we furnished to those who bought livestock at the stockyards.

Q. Just one or two other questions, if I might, please. At the time, Mr. Baker, in 1934 or 1935 that the question arose with
497 reference to moving livestock over the stockyards track No. 10, you wrote to the railroads, and those communications, please, are in here as exhibits, but I would like to ask if you had any dealings with Swift & Company or any other packers served by that track with reference to the change that the Stock Yards Company desired to make with reference to restricting livestock over track No. 10?

A. Mr. Pierce, prior to about 1930 there was little, if any, livestock delivered directly to the plant of Swift & Company, at least if there was any, we didn't know about it. And along in the early thirties, in order to avoid what seemed to be discrimination in providing egress and storage delivery services for Swift & Company as compared with the service being rendered to the farmers, the Stock Yards Company attempted to make a charge from the packers and Swift & Company began to divert livestock from the stockyards to their plant and the volume in 1933 or 1934 had reached such proportions, that we felt it necessary to call upon you to stop the use of the track for the delivery of livestock. We had understood in our contracts that those tracks could be used so long as it didn't interfere with our business, and obviously the diversion of livestock from the stockyards to Swift & Company's plant would constitute an interference with our business.

Q. Then, at the time in 1934 and 1935 when you served this notice upon the railroad companies, was anything at all
498 said by you or the Stock Yards Company to Swift & Company or the packers about your intention to change or restrict the use of this track No. 10, if you haven't already answered that question?

A. As I recall, we had at least one general meeting of the packers out there discussing the matter of deliveries. The packers were of the opinion that they were entitled to a delivery, egress from the yards on shipments consigned direct to them without any extra charge over and above the line haul rate and they based their position on the decision which has recently been recommended by the Commission in the Allied Packers case in Buffalo—I don't recall the volume and case—and the packers generally declined to pay any charges for that service. There may be—I don't recall of any other conversations with Swift & Company with regard to it.

Q. Did Swift & Company have a representative in that meeting in 1934 or whenever it was along about that time in which this proposal to restrict the use of No. 10 track was discussed?

A. I am quite sure they did, but I am trying to recall it. I do know that this matter was discussed in our Board meeting a number of times, and a representative of Swift & Company was there.

Q. Now, Mr. Baker, with reference to this Cleveland Provision Company transaction, would you state for the record here how the controversy was terminated in the court action. I think the record shows here that the court action was settled and
499 dismissed, and if you will state how that was terminated between the Stock Yards Company and the Cleveland Provision Company, we would like to have the record show it.

A. I think when you have furnished copies of those exhibits that you are to furnish, they will probably tell the facts. During the discussions in court and before the Examiner in connection with that matter, it was recognized that while the Stock Yards Company had undertaken to give the Cleveland Provision Company a right-of-way to the land which the Stock Yards Company had sold to the Cleveland Provision Company, the Cleveland Provision Company in turn should not use that land or that right-of-way for the transportation of livestock to its plant or for the erection of stock pens on that land and the granting of a right-of-way specifically reserved those and provides for a termination of that right-of-way in the event the grantee does either—uses the track for the transportation of livestock to the plant or erects stock pens on the land, and with that arrangement the Stock Yards Company and the grantee, who was the trustee of the Cleveland Provision Company, were agreeable to a dismissal of the proceeding.

Q. Then, am I correct in my assumption that there was no written agreement settling the controversy between the trustee of the Cleveland Provision Company and the Stock Yards Company at that time?

A. The granting of the right-of-way was the fulfillment
500 of that agreement. In other words, we had agreed upon the terms of the right-of-way and when it was executed and filed, the case was dismissed.

Q. Mr. Baker, do I understand that it is the position of the Cleveland Union Stock Yards Company now, as holding itself out to the packers and other industries reached by track No. 10, that the Stock Yards Company extends the use of that track for all traffic other than livestock at this time?

A. No; that is not the position of our company.

Q. Will you make that clear, please?

A. The position of our company is that we have contracted with you, the railroads, the New York Central Railroad, to permit its use of that track for traffic other than livestock. We have made no holding out to the packers on that in connection with that track at all, and we have indicated a willingness to permit the use of that track for the transportation of livestock upon the payment of the charge.

Q. I think there is just one more question. To clear up the record here, I would like to state that we have in time referred to track No. 10 and sometimes to track No. 245. They are one and the same track, 245 being one number, and track No. 10 being the Big Four number; I don't recall which.

By Exam. HADEN:

Q. Will you describe it on Exhibit 12?

A. On Exhibit 12 it would be——

Mr. PIERCE. I think the next exhibit does show the
501 track numbers, Mr. Examiner.

A. On Exhibit 13 this so-called track number ten is a track designated by letters B to C–3; that is the track that is owned by the Cleveland Union Stock Yards Company on Cleveland Union Stock Yards land except for that portion at the southern end designated by C to C–1 and from C–2 to C–3.

By Exam. HADEN:

Q. That is on Exhibit 12?

A. On Exhibit 13; and that track and the operation of that track is covered by the sidetrack agreement of June 16, 1924; I don't recall the exhibit number that was introduced.

Q. Track No. 10, Mr. Baker, is sometimes referred to as track No. 245, is it not?

A. Yes, sir.

Mr. PIERCE. And also as 26–A in some instances, Mr. Examiner.

By Exam. HADEN:

Q. One and the same track; all three references, No. 245, No. 10——

A. And NYC 26–A.

Mr. PIERCE. I think that is all.

Exam. HADEN. Any further questions of Mr. Baker?

Mr. RYNDER. No questions.

Exam. HADEN. You are excused; thank you, sir. (Witness excused.)

Exam. HADEN. Does that conclude the testimony of all the defendants? (No response.)

502 Mr. PIERCE. I would like, if it is agreeable to the Examiner and to the parties here to introduce two more exhibits. This first one, which will be marked "No. 50" is a copy of the agreement between the CCC and St. L. Railway Company and Swift & Company, covering the crossing gates and signals at Union Stock Yards and West 65th Street and is dated November 2, 1926.

Exam. HADEN. That is in two sheets?

Mr. PIERCE. In two sheets; yes, sir.

(Exhibit No. 50, marked for identification.)

Exam. HADEN. Any objection to this exhibit being received in evidence?

Mr. RYNDER. None at all. I am merely doing that to shorten the time. I think it is irrelevant and I have thought that of a great deal of the evidence.

Exam. Haden. It may be received.

(Exhibit No. 50, received in evidence.)

Mr. Pierce. The only other thing is a copy of the joint petition by the railroads and the Livestock Terminal Service Company for rehearing, reconsideration, and redetermination of reasonable charges for loading and unloading livestock at Cleveland, Ohio, as of June 19, 1944, and therefore, which was filed in Docket No. 28421, Sub 1, on June 17, 1944. Shall we call that Exhibit 51?

503 Exam. Haden. It may be identified as Exhibit No. 51.

(Exhibit No. 51, marked for identification.)

Exam. Haden. If there is no objection, Exhibit 51 will be received in evidence. (No response.)

(Exhibit No. 51 received in evidence.)

Mr. Pierce. That is all we have, Mr. Examiner.

Exam. Haden. That completes the defendants' case. Mr. Rynder, do you have something further to offer?

Mr. Rynder. I think not.

Mr. Pierce. Did you put in that agreement?

Mr. Rynder. Mr. Ford, will you take the stand again?

Gilbert F. Ford having been previously sworn, was recalled, and testified as follows:

Further direct examination by Mr. Rynder:

Q. Mr. Ford, I hand you a document consisting of two sheets and ask you if it is a true and correct copy of a certain agreement between the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Henry C. Thom, executed at March 19, 1908 [indicating]?

A. It is.

Mr. Rynder. Mr. Examiner, to save delay in copying it and serving it on the parties, I should like to have it read into the record, if I may.

504 Exam. Haden. It may be copied into the record at this point.

AGREEMENT

"We, Henry C. Thom and Julia G. Thom, his wife, in consideration of the benefits and privileges accruing to us by reason thereof, do each severally for ourselves, our heirs and assigns, to the extent of the ownership of us or either of us in the property hereinafter described, hereby grant unto The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors and assigns, an assigns, as easement for the construction, operation, and maintenance of a railroad track in and over the following-described

property, to wit: Being a strip of land sixteen feet in width off the easterly side of sublots Nos. 285 to 255 inclusive of Julia A. Sargent's allotment of part of original Brooklyn Township Lot No. 34 as recorded in Volume 23, page 26, of the Records of Maps of Cuyahoga County, Ohio, and also for the construction, maintenance, and operation of a track upon and over the street upon which said lost abut.

To have and to hold the said easement in said lands unto the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors and assigns, for the construction, maintenance, and operation of said railroad track.

The easement herein granted, however, shall terminate
505 whenever said Grantee, its successors and assigns, shall cease to use said lands for the purposes herein set forth.

In witness whereof the Grantors herein have hereunto set their hands and seals this 19th day of March 1908. Signed, Sealed, Acknowledged, Henry C. Thom, and delivered in presence of Julia G. Thom.

Isabella O. Beatty, John T. Brady, State of Illinois, County of Cook, ss.

Personally appear before me, the undersigned Notary Public in and for said county, the above-named Henry C. Thom and Julia G. Thom, his wife, and acknowledged the signing of the foregoing instrument, and that the same is the free act and deed of them and each of them.

In testimony whereof I hereunto set my name and affix my official seal at Chicago, Illinois this 19th day of March 1908.

Charles J. Tressler, Notary Public."

Exam. HADEN. Are there any further questions of Mr. Ford?

Mr. RYNDER. Yes.

By Mr. RYNDER:

Q. Mr. Ford, calling your attention to Exhibit 40 and the fact that is is signed by Swift & Company, per J. H. H., will you please state who is the person having the initials of J. H. H.?

A. J. H. Hurley.

506 Q. What is his position?

A. He is local traffic representative of the Swift & Company at Cleveland.

Q. Is he an officer of the company?

A. He is not.

Q. On the tariff eliminating the delivery of livestock on the private sidetrack of Swift & Company, I believe it became effective November 12, 1938?

A. I believe that is correct.

Q. In your Chicago office had you been notified of that change in the tariff prior to its effective date?

A. No.

Q. Is that the reason suspension was not asked at that time?

A. That is the reason.

Q. And that was just because somebody slipped up, I take it; failure to notify you of the change?

A. Just one of those changes that gets through without being brought to our attention.

Mr. RYNDER. That is all.

EXAMINATION BY EXAMINER

By Exam. HADEN:

Q. Mr. Ford, I show you Exhibit 12 of record, will you please state what purpose is made by Swift & Company of the land and area shown on the exhibit encircled "26", lot Nos. 143 to 160, on Exhibit 12, indicated by Swift & Company; will you state for what purpose that property is now being used?

307 A. Well now, the buildings of Swift & Company, generally speaking, start at lots 154 and 261 and run north to and including what was known formerly as the Federal Packing Company, which runs up through 147 and 268.

By Mr. BAKER:

Q. May I suggest on Exhibit 13 you will see the location of the buildings and the lot numbers also.

A. That shows the lot numbers on the south, Mr. Examiner, but you have to go up to the end. It doesn't appear here. I was going to say to the end of the track, but it doesn't appear here. Our operation takes in the Federal Packing Company as shown on Exhibit 13, and it takes in what is shown as Swift & Company on Exhibit 13, and the other property south thereof is vacant property.

By Exam. HADEN:

Q. Where is "south thereof"?

A. Right here. In other words, from 154 to 261.

Q. On Exhibit 13?

A. Which are two lots shown on Exhibit 13 immediately adjoining our plant on the south; from thereon south through—well, to the track that goes across the property entering at lot 166 and circling northeast through 164, 252, 253, 254, 255, 256, and thence along the street. That area in there is entirely vacant property. Immediately adjoining our plant——

Q. Another packing plant adjoins that area?

A. That is our packing plant; that is Swift & Company. This Blumenstock & Reid Company, which was a packing house,
508 that has been taken down and additional pens were proposed, but not built.

Q. What direction is that?

A. This is east.

Q. To the east of that property crossing the track do you have another area there designated as Swift & Company; is that a packing plant?

A. That is the powerhouse for the packing plant, and these tracks receive coal and someone mentioned we had coal in this area west of 63rd and south of our plant. That is merely an emergency coal pile and is due to these conditions existing today. We have a coal pile on the side of the street by the powerhouse, but we keep an unusual coal supply on hand because of the emergency.

Q. Are all your packing facilities west of the tracks?

A. West of West 63rd Street.

Q. As shown on Exhibit 13?

A. Yes.

Exam. HADEN. That is all. Any further questions of Mr. Ford?

Cross-examination by Mr. PIERCE:

Q. I would like to ask you, Mr. Ford, when you speak of proposed pens and make reference to the area where the Blumenstock-Reid Building had been dismantled, if you have any plans of any proposed pens or anything, at that time where any such proposal was developed to such a point?

509 A. There was no point to our building those pens because the carriers refused to make delivery into our plant.

Q. There have been no pens built on Swift & Company's property except those pens adjacent to west 65th Street, which today are being measured by the engineers?

A. That is correct.

Mr. PIERCE. That is all.

Redirect examination by Mr. RYNDER:

Q. Mr. Ford, outside of there mere expenses of building pens, this is vacant ground belonging to Swift & Company on which a great many pens could be built, isn't it?

A. There is; all of those lots indicated in my previous statement in connection with Exhibit 13.

Q. In other words, there is ground for tremendous expansion of pens?

A. Yes.

Mr. RYNDER. I believe that is all.

Exam. HADEN. If there are no further questions, you may be excused. (Witness excused.)

Are there any other witnesses to testify?

(No response.)

Mr. Pierce, the second exhibit, Exhibit 51, has been received in evidence as well as No. 50, which you had just previously introduced.

Now gentlemen, this proceeding was reopened for
510 further hearing for the purpose of enabling the Commission to have a little more information before it in connection with a number of questions that were asked at the oral argument from the bench, and under those circumstances I am of the opinion that a proposed report will not be required.

There will be no proposed report issued.

I will set the brief date as the opening brief, as August 15, 1944, and the brief date of the opposing parties as of September 5, 1944, and the reply brief as of September 19, 1944.

Mr. PIERCE. Mr. Dobbins just suggested here that we were under the impression that you would entertain a suggestion for a proposed report, and naturally we were disappointed. We would like, if possible, to have a proposed report in this case, Mr. Examiner, there having been quite a number of items included here, which have not been covered by any oral argument, and would not be without the proposed report here. It seems to me that we ought to have a proposed report, as Mr. Rynder suggested, that it does narrow the issues when it gets before the Commission again and it will be narrowed down for them to consider, only about three items to consider.

Mr. RYNDER. I would like to very much join with Mr. Pierce in that suggestion. I think it is more than usually forced in this case because I think this case raises a lot of questions, at
511 least it is hard for me to find any authority on that.

Mr. BAKER. Mr. Examiner, I would like to join in the request for a proposed report, for the reason that some of the arguments presented by Mr. Rynder have been presented since the matter was considered by the Examiner before. I think it would be helpful to all of us if we had a proposed report, and the Examiner considering all of the issues before him now.

Exam. HADEN. Off the record, please.

(Discussion had off the record.)

Exam. HADEN. On the record.

Mr. DOBBINS. Mr. Examiner, I want to indicate that the Nickel Plate is joining with the New York Central with reference to a proposed report.

Exam. HADEN. I think Mr. Fitzpatrick, when he left, indicated he wanted a proposed report.

Mr. FARMER. We will make it unanimous.

Exam. HADEN. In view of the expressions of counsel, I believe it is necessary to modify my prior statement concerning the briefs, and to make this a proposed report case, and we will set the brief date as of August 15, 1944.

Now, is there anything further to come before us at this time?

Mr. PIERCE. Not from the railroad.

Exam. HADEN. If there is nothing further, the hearing is closed.

(Hearing concluded at 5:35 o'clock P. M.)

513 *Exhibit No. 2*

Rates and Charges published in this supplement are not subject to the Increases provided in Sup. No. 32

SUPPLEMENT No. 50

(Cancels Supplements Nos. ③38, ④40, 46, and 49) to Ill C. C. No. 1005, I. R. C. No. 2442, M. P. U. C. No. 885, Ohio No. 2932, I. C. C. No. 8785 (Supplements Nos. ①32, ②33, and 50 contain all changes from the original tariff that are effective on the date hereof).

BIG FOUR ROUTE

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY

(The New York Central Railroad Company, Lessee)

In connection with Louisville & Jeffersonville Bridge and Railroad Company, FX5, No. 9, F15, No. 2, and Other Carrier Parties to Tariff Named on Page 3 of Tariff as Amended

Supplement No. 50 (Cancels Supplements Nos. 41, 46, and 49) to Joint, Local, and Proportional Switching Tariff No. 1-N (Supplements Nos. ①32, ①33, ②33-A, ①34 and 50 contain all changes) Containing Switching Rates and Rules Governing Absorption of Switching, Trap Cars, and Transfer of Freight at Stations on The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Louisville & Jeffersonville Bridge and Railroad Company

Issued December 27, 1938. Effective January 28, 1939 (Except as otherwise provided herein).

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① Special Supplement (Ex Parte 123).
② Postponement Notice on Indiana Intrastate traffic. (Filed with I. R. C. only.)
③ Not filed with I. R. C. or Ill. C. C.
④ Filed with Ill. C. C. and I. R. C. only.

EQUESTRIUM

Big 4 Track #253 = N.Y.C. #54 or L.S.&M.S. Feed

Big 4 Track #252 = N.Y.C. #52 or Local #1 Feed

Columbus

Shoulder of Road

Road Level

Shoulder of Road

Pavement

Farm Bureau Cooperative Association Inc

W. L. E. Ry

C. C. C. & St. L. Ry.

Cinder Driveway

Big 4 Tr. #251 = N.Y.C. #50 or Local #4

Storage Track 441'

1203'

Platform

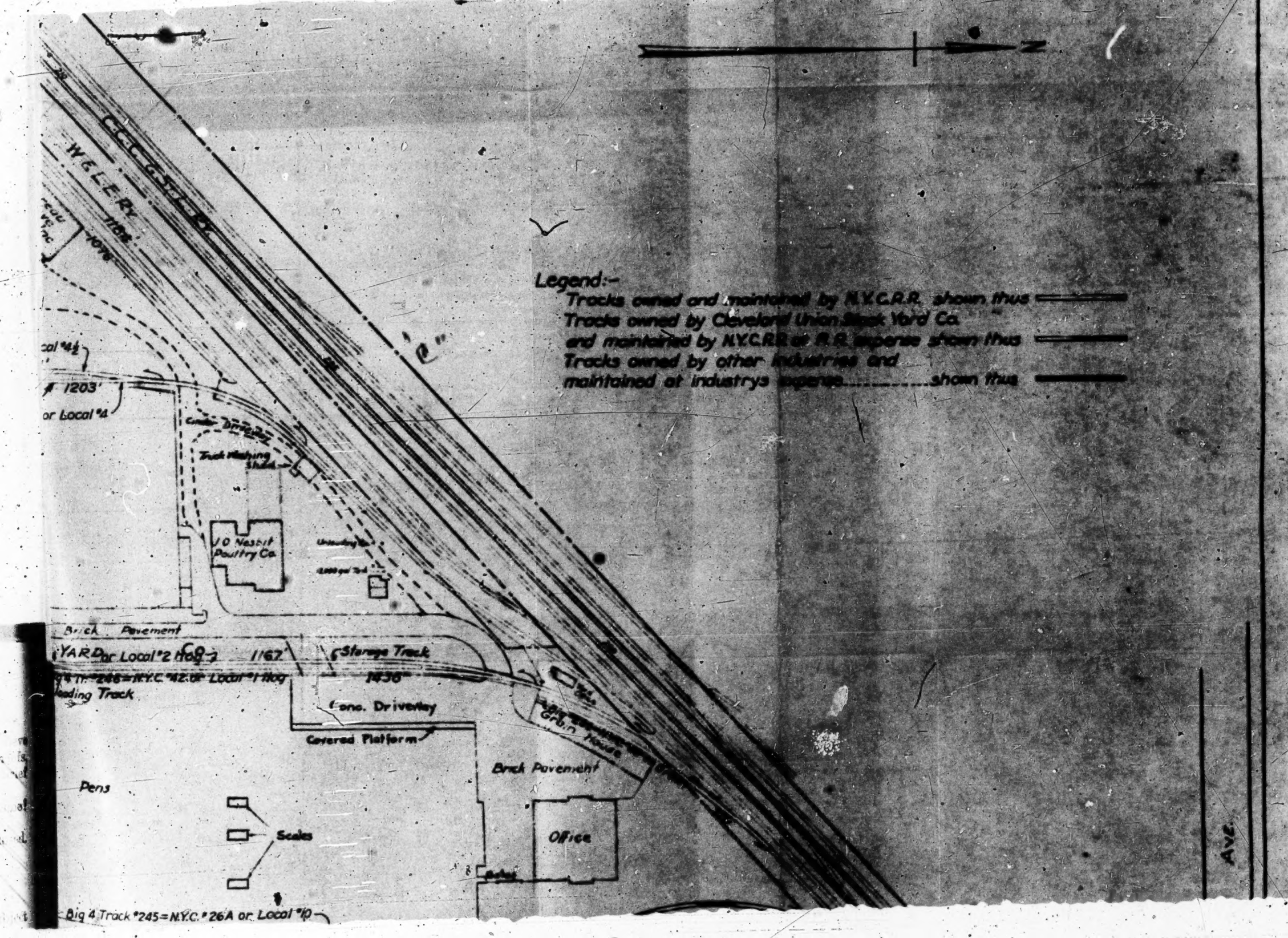
Loading Track

Big 4 Tr. #250 = N.Y.C. #48 or Local #6

Covered Stock Pens

Hay Barn

V. O. Nisbit Poultry Co.


C.C.C. & St. L. Ry.
W.S.L.E. Ry.
Legend:-
Tracks owned and maintained by N.Y.C.R.R. shown thus
Tracks owned by Cleveland Union Stock Yard Co.
and maintained by N.Y.C.R.R. at R.R. expense shown thus
Tracks owned by other industries and
maintained at industrys expense.....shown thus
1203'
or Local "4
Truck Washing Shed
10 Nesbit Poultry Co.
Brick Pavement
YARD or Local "2 Hog
1167'
Storage Track
1438'
Loading Track
Conc. Driveway
Covered Platform
Brick Pavement
Pens
Scales
Office
Big 4 Track "245 = N.Y.C. "26A or Local "10
Ave.

STOCK YARDS

Earl C Gibbs Co

Kennedy & Leahey

Lake Coal Co

Covered Stock Pens

Unloading Track

Driveway

Scales

Big 4 Track #263 = N.Y.C. #26A or Local #9

Cleveland Ry Co

WEST 65th

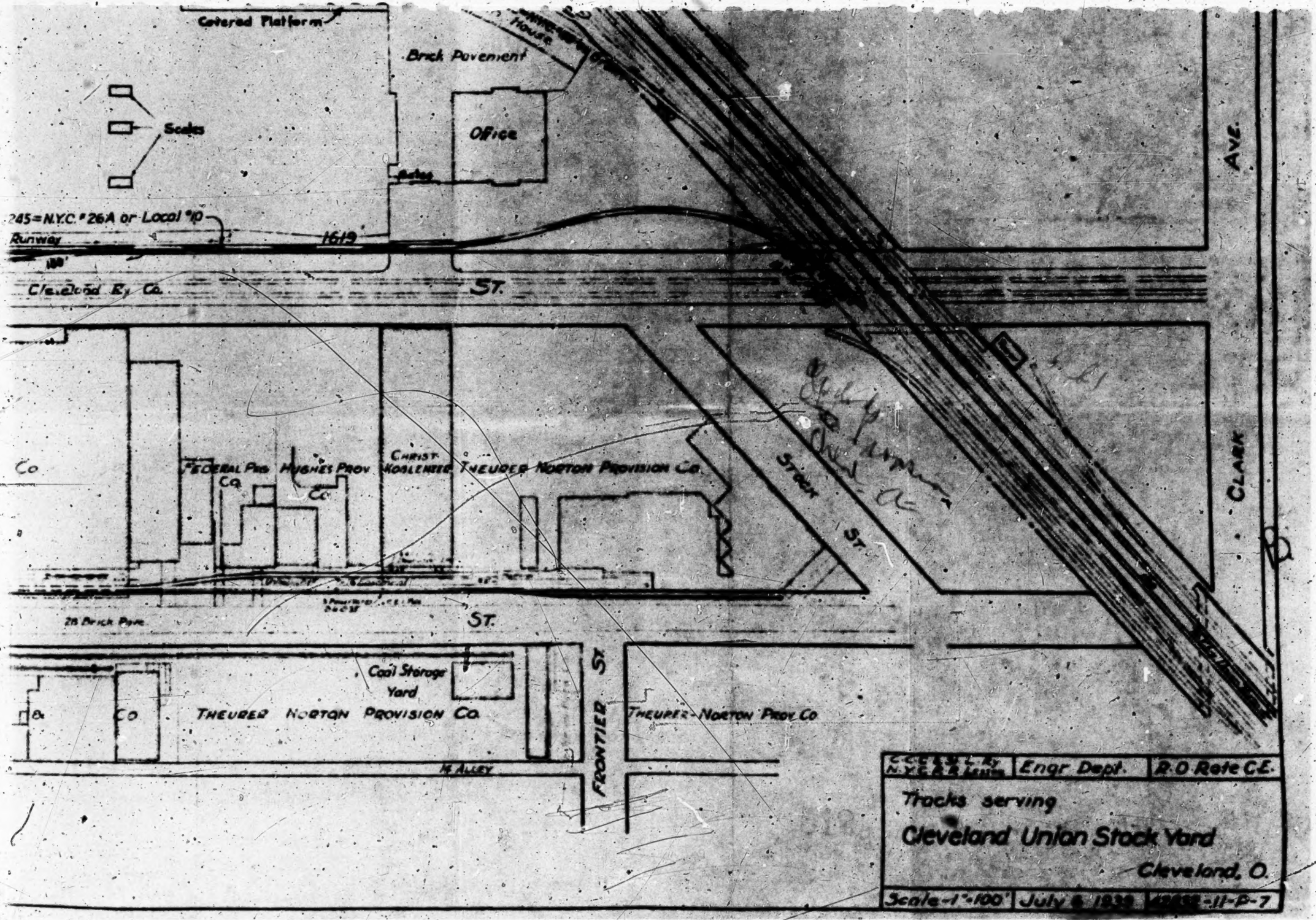
WEST 63rd (Prim)

SWIFT & Co

SWIFT & Co

SWIFT & Co

THEURER NORTON


Covered Platform
Brick Pavement
Scales
Office
245=N.Y.C. #26A or Local #10
Runway
1619
Cleveland Ry Co.
ST.
Co
Federal Pkg Co
Hughes Prov Co
Christ. Hoolehrer
Theurer Norton Provision Co.
Stone St.
Clark Ave.
ST.
Coal Storage Yard
Theurer Norton Provision Co.
Co
Theurer-Norton Prov Co
Frontier St
N. Alley
C.C.C.St.L.Ry
N.Y.C.R.R.Lines
Engr. Dept.
P.O. Rate C.E.
Tracks serving
Cleveland Union Stock Yard
Cleveland, O.
Scale-1"=100'
July 6 1939

The Tariff hereby amended will be further amended or reissued to provide specific publication of rates and charges increased under Ex Parte 123, effective on or before March 29, 1939.

Issued by Chas. Coughlin, Chief of Tariff Bureau, 466 Lexington Avenue, New York, N. Y.

Item No.	Applying at—	Application		
		Between		And points of interchange with B&O, Erie, NYC, NYC&StL (NFDist) PRR, W&LE
		Firm	Location	Rate per car (see exceptions in Item 1040)
1005-B Cancels ①1005-A	Cleveland, Ohio (20506-33)	Sherwin Williams Company	Upper Flats	$1.47
		Silberman Co., E. A., The	Lower Flats	3.47
		Simmons Co., The	Central Flats	3.47
		Sly Manufacturing Co., W. W., The	Lower Grade	3.47
		Smeed Box Co., The	Upper Flats	3.47
		Smith Facing Supply Co., The	Upper Flats	3.47
1010-B Cancels 1010-A		South West Coal Co. (Leisy Switch)	Lower Grade	6.47
		Standard Beef Co	Upper Grade	②2.47
		Standard Brewing Co., The	Lower Grade	3.47
		Standard Oil Company	Upper Grade	3.47
		Standard Slag Co	Central Flats	3.47
1015-C Cancels 1015-B	Switching Limits: From the Cleveland Short Line Connection at Linndale, Ohio, on the west to the termini of the tracks of the CCC&StL on the east.	Swift & Co	Upper Grade	②3.47
		Team Tracks	All	(See Item 1035)
		Theurer-Norton Provision Co., The	Upper Grade	②3.47
1020-A Cancels ①1020	The rates herein published to and from Industrial Tracks on the CCC&StL apply only to cars containing freight belonging to the rightful owner of the switch. Cars consigned to or loaded by other parties will be handled on the published Team Track rate, provided permission has been secured from the owner of the switch and the CCC&StL.	Unclaimed Freight Warehouse	Upper Flats	3.47
		U. S. Gypsum Co	Lower Flats	3.47
		‡United Supplies Co	Upper Grade	3.47
		Vulcan Coal Company	Lower Grade	3.47
		Wagner Co., F. C	Upper Flats	3.47
		Walsh Construction Co	Linndale	3.47
		Walsh Construction Co	Upper Grade	3.47
1035-B Cancels ①1035-A	①Will not apply on livestock.	Weber Hardware Stores	Linndale	3.47
		Weideman Co., The	River District	②3.47
		Wells Construction Co., J. A	River District	3.47
		West End Lumber Co	Linndale	4.47
		Whitaker-Glidden Co., The	Upper Grade	4.47

②Applies only on Coal and Material for Boiler House.

Canceled ⓒ1035-A		Williams Oil-O-Matic Co., The Williams Oil Stations, Inc.	Central Flats Lower Flats-Oil

ⓒApplies only on Coal and Material for Boiler House.

		Between—		And points of interchange with—	
				B&O, Erie, NYC&StL (NPDist) PRR, W&LE	NYC
		Team tracks	Location	Rate per ton of 2,000 or 2,240 pounds as rated	Rate per car (see exceptions in Item 1040)
ss 1035-A Cancels ⓒ1035		‡Team tracks	All		$3.47
		Team tracks	Central Flats	ⓒ42 cents	
		Team tracks	Lower Flats	ⓒ42 cents	

ⓒMinimum 25 tons, actual weight if in excess.
‡All Team tracks are open to the NYC. For specific team tracks open to other roads see specific tracks listed.

Clyde, Ohio
(20598-34)

Switching Limits:
North—From Freight Station one thousand (1,000) feet to Wm. A. Yeagle.
South—From Freight Station two thousand five hundred (2,500) feet to Gross Lumber Yard.

		Between—		And points of interchange with NYC, W&LE
ss 1075-A Cancels ⓒ1075		Firm	Business	Rate per car
		Clyde Mill Company	Flour Mill	$2.97
		Gross Lumber Company	Lumber and Cement	2.97
		Irving G. Fangboner Co., The	Grain and Salt	2.97
		Standard Oil Co.	Oil	2.97
		‡Team Tracks:	General	$2.97
		Trump, S. W.	Coal	2.97
		Yeagle, Wm. A.	Cement Blocks and Cement	2.97

‡Applies only to or from the NYC.

515 *Exhibit No. 3*

Rates and Charges published in this supplement are not subject to the increases provided in Sup. No. 32

SUPPLEMENT No. 67

(Cancels Supplement No. 65) to Ill. C. C. (C. C. C. & St. L.) No. 1005; I. R. C. (C. C. C. & St. L.) No. 2442; M. P. S. C. (C. C. C. & St. L.) No. 885; Ohio C. C. C. & St. L.) No. 2932; I. C. C. (C. C. C. & St. L.) No. 8785. (Supplements Nos. ③ A, ① 32, ② 33, 50, 61, 63, ④ 66, and 67 contain all changes from the original tariff that are effective on the date hereof.)

THE NEW YORK CENTRAL RAILROAD COMPANY

In connection with Louisville & Jeffersonville Bridge and Railroad Company (FX5, No. 9, F 15, No. 2) and other carriers parties to tariff named on page 3 of Tariff as amended.

SUPPLEMENT No. 67

(Cancels Supplement No. 65) to Joint, Local, and Proportional Switching Tariff No. 1-N. (Supplements Nos. ③ A, ① 32, ① 33, ② 33-A, ① 34, 50 61, 63, ④ 66, and 67 contain all changes) containing switching rates and rules governing absorption of switching trap cars, and transfer of freight at stations on The New York Central Railroad Company (Cleveland, Cincinnati, Chicago and St. Louis District) and Louisville & Jeffersonville Bridge and Railway Company.

Issued September 8, 1939. Effective October 11, 1939. (Except as otherwise provided herein.)

Departure from the terms of Rule 9 (e) of Tariff Circular No. 20 is authorized under permission of the Interstate Commerce Commission No. 164928 (corrected) of November 29, 1937.

Departure from the terms of Rule 9 (e) of Tariff No. 20 is authorized under permission of the Interstate Commerce Commission No. 167170 of March 12, 1938, as amended.

The Tariff hereby amended will be further amended or reissued to provide specific publication of rates and charges increased under Ex Parte 123, effective on or before March 29, 1940.

① Special Supplement (Ex Parte 123).

② Postponement Notice on Indiana Intrastate Traffic. (Filed with I. R. C. only).

③ Special Supplement filed only with M. P. S. C. and only changes "M. P. U. C." to read "M. P. S. C." (Blanket 463).

④ Special Supplement (Blanket 2).

Issued by Chas. Coughlin, Chief of Tariff Bureau, 466 Lexington Ave., New York, N. Y.

Participating Carriers

Most of participating carriers is as shown in Tariff as amended, except:

Abbreviation	Carrier	Concurrences							
		I. C. C.		III. C. C.		I. R. C.		M. P. S. C.	
		FX	No.	FX	No.	FI	No.	FM	No.
C. C. C. & St. L.	Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The (The New York Central Railroad Company, Lessee).	▲Eliminate. (Now N. Y. C. R. R.)							

Change in Name of Carrier

The Carrier shown in Column No. 2 below, by its adoption notice shown in Column No. 3 below, having taken over tariffs, etc., of the Carrier shown in Column No 1, below, the Carrier shown in Column No. 2, below, is hereby substituted for the Carrier shown in Column No. 1 below, wherever it appears in this tariff.

Column No. 1—Old carrier	Column No. 2—Adopting carrier	Column No. 3—Adoption notice, I. C. C. No.
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee).	The New York Central Railroad Company	1

Explanation of Abbreviations

Explanation of Abbreviations is as shown in tariff except:

Abbreviation	Explanation
N. Y. C. (C)	The New York Central Railroad (Cleveland, Cincinnati, Chicago and St. Louis District).

Explanation of Reference Marks

↓Reduction. ↑Add. ●No change in rate.
▲Changes in wording which results in neither increases nor reductions in charges.
Ⓐ As amended by Supplement No. 32.
Ⓑ Reissued from Sup. 64, effective September 17, 1939.
Ⓒ Reissued from Sup. 65, effective September 29, 1939.

Section No. 2

Item No.	Exceptions to rules governing absorption of connecting lines' terminal switching charges applying at stations indicated
	Applies at Cairo, Ill.
103-A Cancels 103	On each car of the following commodities, viz: Cottonseed, Cottonseed Products, Soya Beans and Soya Bean Products, which has been switched between industries at Cairo, Ill., and is subsequently reshipped via The C. C. C. & St. L. to points beyond Cairo, Ill., The C. C. C. & St. L. will absorb $3.47 of the switching charge assessed by The C. C. C. & St. L. or connecting lines, as the case may be, for movement to industry making reshipment, upon presentation of paid switching bill and evidence of reshipment via The C. C. C. & St. L. within six months of date of switching bill.
	Applies at Vincennes, Ind.
4446 (new)	On carload shipments of Grain and Products of Grain granted transit privileges under tariffs of inbound carriers at transit houses located on connecting lines, the N. Y. C. (C) will absorb the outbound switching charges from the transit house to the rails of the N. Y. C. (C) when such shipments are forwarded from Vincennes, Ind., via the N. Y. C. (C).

Section No. 3—Reciprocal Switching Rates

Item No.	Applying at—	Application		
		Between—		And point of interchange with C. I. P. R. R. (except as noted)
		Firm	Business	Rate per car
	Anderson, Ind. (20569-3)			
500-A Cancels (A) 500	**Switching Limits:** North.—From Passenger Station two and nine-tenths (2.9) miles. South.—From Passenger Station one and one-half (1½) miles. East.—From Passenger Station three-fourths (¾) mile. West.—From Passenger Station one and seventy-seven hundredths (1.77) miles.	Fadley & Son	Coal and Ice	(R) $3. 96
		Fisher, Thomas	Coal and Flour	(R) $3. 96
		Glaser Bros	Junk	(R) $3. 96
		‡Greer Steel Company	Steel	(R) $3. 96
		Hill Standard Manufacturing Co	Vehicle Manufacturers	(R) $3. 96
		Hoppes & Miller	Coal	(R) $3. 96

(R) Rate not to apply to or from point of interchange with P. R. R.

For Explanation of General Reference Marks, see above.

517

Exhibit No. 4

SWIFT & COMPANY
UNION STOCK YARDS, CHICAGO

Participant American Meat Institute Advertising and Sales Program

AUGUST 14, 1941.
A–18836

Mr. C. J. BRISTER,
Vice President, Freight Traffic,
New York Central System,
230 Park Avenue, New York, New York.

Mr. WALTER S. FRANKLIN,
Vice President in Charge of Traffic,
Pennsylvania Railroad,
Broad Street Station Building,
Philadelphia, Pennsylvania.

Mr. J. H. DAY,
Vice President,
The New York, Chicago and St. Louis Railroad Company,
The Terminal Tower, Cleveland, Ohio.

Mr. GEO. DURHAM,
Vice President and General Manager,
The Wheeling and Lake Erie Railway Company,
626 Huron Road, Cleveland, Ohio.

Mr. GOLDER SHUMATE,
Vice President, The Baltimore & Ohio Railroad Company,
Baltimore & Ohio Building,
Baltimore and Charles Streets,
Baltimore, Maryland.

Mr. CARL HOWE,
Vice President, Erie Railroad,
Hudson Terminal,
50 Church Street, New York, New York.

GENTLEMEN: Swift & Company operates a packing plant at Cleveland, Ohio, located upon the rails and having track connection with the New York Central Railroad Company, as identified in New York Central Railroad Tariff I. C. C. 8585.

In order to avoid the possibility of excess charges which may accrue if the livestock shipped to Cleveland, Ohio is delivered

by your lines at the Cleveland Union Stock Yards, Swift & Company will immediately bill all its shipments of livestock for Cleveland for delivery at its plant in Cleveland and you are requested to see that such delivery is made.

Yours very truly,

SWIFT & COMPANY.
W. A. Mayfield,
WAM

518 *Exhibit No. 5*

SEPTEMBER 27, 1941.

Mr. W. A. MAYFIELD,
Swift & Company,
Union Stock Yards, Chicago, Illinois.

DEAR SIR: Your letter of August 14th, File A–18836, addressed to the undersigned railroads jointly, sets forth that your packing plant at Cleveland has a track connection with the New York Central Railroad, and after stating that you will bill all your shipments of livestock for delivery at your plant in Cleveland, you request us to see that such delivery is made.

As you know, the railroads cannot make delivery of livestock at your plant without traversing a track owned by The Cleveland Union Stock Yards Company. We shall be glad to comply with your request when, as and if we are advised by you that you have obtained the consent of the owner of this track for the use thereof without obligation to the railroads, for the delivery of livestock shipments to your plant. You will appreciate that until this consent is obtained by you, we will be unable to comply with your request.

Very truly yours,

W. S. FRANKLIN,
V. P., Pennsylvania Railroad.
GOLDER SHUMATE,
V. P., Baltimore & Ohio Railroad.
CARL HOWE,
V. P., Erie Railroad.
J. H. DAY,
V. P., The N. Y. C. & St. L. R. R. Co.
GEORGE DURHAM,
V. P. & G. M., The W. & L. E. Ry. Co.
C. J. BRISTER,
V. P., New York Central System.

519 *Exhibit No. 6*

G. A. A. Co.—9-40—40M
Printed in U. S. A.

(Uniform Live Stock Contract, adopted by Carriers in Official Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1939)

UNIFORM LIVE STOCK CONTRACT

This form of Contract to be used for Shipments of Live Stock and Wild Animals instead of Uniform Bill of Lading

DUPLICATE ORIGINAL—NOT NEGOTIABLE

THE NEW YORK CENTRAL RAILROAD COMPANY
(Cleveland, Cincinnati, Chicago & St. Louis District)
5260 Indianapolis, Ind., U. S. Yards, Station

SEPT. 24, 1941.

This Agreement, made this 24 day of Sept., 1941, by and between the C. C. C. & St. L. Ry. Co., The N. Y. C. R. R. Co., lessee, party of the first part, hereinafter called the carrier,* and Swift & Co., party of the second part, hereinafter called the shipper;

WHEREAS, The classifications and tariffs under which this agreement is made require that, for the purpose of applying the lawful rate of freight, the shipper must declare the shipment to be "Ordinary Live Stock," specifying the kind or kinds of animals, or if not "Ordinary Live Stock" he must declare the kind and value of each animal, space for such declaration being provided below:

NOW, THEREFORE, This Agreement Witnesseth, that the carrier has received from the shipper, subject to the classifications and tariffs in effect on the date of issue of this agreement, the live stock described below, in apparent good order, except as noted, consigned and destined as indicated below, which the carrier agrees to carry to its usual place of delivery at said destination, if on its road or on its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier* of all or any of said live stock over all or any portion of said route to destination, and as to each party at any time interested in all or any of said live stock, that every service to be perfomed and every liability incurred in connection with said shipment shall be subject to all the conditions, whether printed or written, herein contained, including the conditions on back hereof, and which are agreed to by the shipper and accepted for himself and his assigns.

Consigned to Swift & Co. Plant Delivery.
Destination Cleveland, State of Ohio.

Route NYC (C) (110/80) (143/144)
Car Initials and Numbers SLSX 71430 QLSX 6025.

ORDINARY LIVE STOCK

Ordinary live stock means all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. On shipments of ordinary live stock no declaration of value shall be made by the shipper, nor shall any values be entered on this bill of lading.

36 Hour Release Executed

I (We) declare the shipment covered by this bill of lading to be ordinary live stock.

SWIFT & Co.
Shipper

OTHER THAN ORDINARY LIVE STOCK.

On shipments of live stock chiefly valuable for breeding, racing, show purposes, or other special uses, different rates of freight are in effect dependent on the valuation placed thereon by the shipper; which valuation may be the basic value as stated in the classification, at which the lowest freight rate applies, or it may be any higher valuation up to actual value, in which event the freight rate will be higher by the amount prescribed in the tariffs or classifications. Such declared or agreed values shall be entered in the column provided therefor in this bill of lading and in no event shall the carrier be liable for any amount in excess of such valuation.

I (We) declare the shipment covered by this bill of lading to be other than ordinary live stock, and of the value herein declared, or agreed upon, and entered.

Shipper

NOTE.—The shipper shall execute one of the above declarations. Upon refusal of a shipper of other than ordinary live stock to declare the values of said stock for entry in this bill of lading the shipment will not be accepted for transportation under this contract. In the event the shipment consists of both ordinary live stock and other than ordinary live stock, both of such declarations shall be executed, but values shall be declared and entered on only the other than ordinary live stock.

Number and description of animals.	Shippers' declared value. (If on live stock chiefly valuable for breeding, racing, show purposes, or other special uses).	Weight (Subject to correction)	Rate of freight	
			Per 100 pounds	Per car
1/60 Ft. D. DK., Sheep 1/60 Ft. D. DK. 257 Sheep	Loaded 3:00 P.M. do	42,900	30	

SYC Rlsd. for slaughter.

Subject to Section 3 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

This shipment is tendered and received subject to the terms and conditions. _____

Signature of Consignor.

SWIFT & Co.

If charges are to be prepaid, write or stamp here, "To be prepaid."

Acknowledgement to be used if freight is prepaid.

T. M. Kautzman, Livestock Agt.

Received, $ _____, to apply in prepayment of the charges on the live stock described hereon.

Agent's signature.

_____

Agent or Cashier.

Per _____

(The Signature here acknowledges only the amount prepaid.)

Charges advanced, $3.30 RR SND BED

The C. C. C. & St. L. Ry., the N. Y. C. R. R. Co., lessee; T. M. Kautzman, Live Stock Agt.

Bq _____, Agent.

Witness my hand: Swift & Co., Shipper. By E. E. Brannon, Shipper's Agent. J. J. Whitehead, Witness.

*The word "carrier" is to be understood throughout this Contract as including any Person or Corporaton in possession of the Live Stock under the contract.

520 *Exhibit No. 7*

Reproduction of Appendix I, II, and III of the Interstate Commerce Commission's decision in Ex Parte 127, consisting of copies of letters between the Livestock Terminal Service Company and the New York Central Railroad Company. Also copy of an agreement between the Cleveland Union Stock Yards Company and Livestock Terminal Service Company.

521

APPENDIX I

LIVESTOCK TERMINAL SERVICE COMPANY

3200 West 65th St.

CLEVELAND, OHIO

MAY 23RD, 1940.

The BALTIMORE & OHIO RAILROAD CO.
The ERIE RAILROAD COMPANY.
The NEW YORK CENTRAL RAILROAD CO.
The NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO.
The PENNSYLVANIA RAILROAD COMPANY.
The WHEELING & LAKE ERIE RAILWAY COMPANY.

GENTLEMEN: In accordance with the understanding reached at yesterday's conference with representatives of railroads serving Cleveland, the offers of May 21 and 22, 1940, are withdrawn and the following offer is made:

This Company has obtained a license from The Cleveland Union Stock Yards Company to use suitable and necessary facilities and to engage in business as an independent contractor and furnish services heretofore furnished by The Cleveland Union Stock Yards Company in connection with the transportation and delivery of livestock shipped from or destined to, or while in transit at, the Cleveland Union Stock Yards, that are incumbent upon railroads under their published tariffs or as common carriers or warehousemen.

This Company offers to perform the following services under the terms and conditions and for the compensation hereinafter provided:

(a) Duly and promptly load into cars, and unload from cars upon arrival, all consignments of livestock which the railroad company shall desire to be handled at the Cleveland Union Stock Yards, and perform all services in respect of receipt, loading, unloading, handling, weighing, sorting, and care of such livestock, and delivery to consignee, that are incumbent upon the railroad company under its published tariffs, or as a common carrier or warehouseman.

(b) Promptly notify all consignees of the arrival of such livestock, preserve the identity of each separate consignment, make delivery to consignees, and obtain their receipts therefor.

(c) Perform clerical services specified in contract dated June 1, 1934, between The Cleveland Union Stock Yards Company and railroads serving Cleveland.

(d) Provide suitable facilities and service and wholesome feed and water for feeding, watering, resting, and caring for livestock while awaiting shipment or delivery to consignees.

(e) Comply with all applicable laws, rules, ordinances, and regulations, Federal, State, and Municipal, in the loading, unloading, handling, storage, care, watering, feeding, resting, and delivery of livestock.

(f) In the performance of such of these services as may be provided for in the published tariffs of the railroad company, this Company will act as agent of the railroad company in the performance of its obligation as a common carrier, except that this Company agrees to exercise due diligence in the performance of its duties under this agreement, and to indemnify, protect and save harmless the railroad against all loss or damage or expense on account of its failure to exercise such diligence. This Company shall be deemed to be in charge of and responsible for all livestock handled by it for said railroad under this agreement, as follows:

522 (a) On in-bound livestock, from the time car door is opened by employees of this Company until delivered to consignee; and

(b) On out-bound livestock, from the time such livestock is received for shipment until placed in cars and car doors closed.

Nothing herein contained shall increase the liability of the Livestock Terminal Service Company beyond that of warehouseman after the period when the railroad's liability as common carrier has ceased, or make this Company responsible for injuries to said livestock occasioned by the negligence of the railroad or its employees or agents other than the Livestock Terminal Service Company.

(g) Provide and keep provided at the Cleveland Union Stock Yards, suitable, adequate, and proper accommodations for the receipt, loading, unloading, weighing, care, handling, and delivery of livestock which the railroad company may desire to be received or discharged at the Cleveland Union Stock Yards in Cleveland, Ohio.

The compensation for the performance of the services herein offered shall be as set out below, and, except as provided in Items numbered 3 and 4, shall be paid or guaranteed to this company by the line haul railroad at the time such services are performed.

1. For services of receipt, loading, shipment, unloading, handling, and delivery to consignee, including storage for 24 hours:

(a) Livestock consigned to or from the public market conducted at the Cleveland Union Stock Yards, $2.50 per deck.

(b) Livestock consigned direct to packers and not offered for sale on the public market, $4.00 per deck.

(c) Other livestock shipped from or to the Cleveland Union Stock Yards, $0.50 per head.

2. For services in addition to the cost of the feed in connection with shipments stopped for feed, water, or rest to comply with the 28-hour law or other regulations:

(a) When fed in cars, $2.00 per deck.

(b) When loaded into suitable pens, fed, watered, rested 5 or more hours, and reloaded, $5.00 per deck.

3. For services required for the care of shipments, the charges for which shall be a lien against property in addition to charges in Items 1 and 2, and paid or guaranteed to this Company before release of property:

(a) Storage for each day or fraction thereof after the expiration of 24 hours after receipt from consignor for shipment or from the railroad company for delivery to consignee:

	Cents per head
Cattle	10
Calves	5
Hogs	3
Sheep	2

(b) Feeding to comply with State or Federal laws or regulations, or in accordance with instructions from owners, or humane practices while awaiting shipment or delivery to consignee will be charged for at the cost of feed delivered in pens.

4. For use hoof scale and weighing, to be paid by the per-
523 son requesting this service: Twenty cents per draft, minimum 25¢ per deck.

5. For miscellaneous services:

(a) Cleaning and disinfecting cars: (1) Single deck cars $2.50; (2) Double deck cars, $4.00.

(b) Bedding cars: $2.00 per deck for standard bedding, excess bedding supplied at a proportionate charge.

(c) Installation of partitions in cars: $1.00 for small partitions and $2.00 for large partitions, plus cost of material, subject to maximum of $3.50 per car.

(d) Tying bulls: 25¢ each, plus cost of rope.

(e) Miscellaneous services not specifically covered herein will be performed under special arrangements.

6. For clerical services referred to in paragraph (c), page 1, $400.00 per month as provided in contract dated June 1, 1934, between The Cleveland Union Stock Yards Company and the railroads serving Cleveland. The Livestock Terminal Service Company will obtain from The Cleveland Union Stock Yards Company an assignment of said contract, and the Cleveland railroads, parties to such contract, will consent to the assignment thereof.

It is not to be understood that the Livestock Terminal Service

Company, in taking an assignment of the said contract, in any way acknowledges that the payments thereunder are solely attributable to the clerical services which it will perform under this offer.

The Compensation to be paid by the railroad company to this Company for the performance of the services herein offered, is based upon the services which the railroad company is obliged to perform in respect to the receipt, loading, unloading, weighing, handling, sorting, care, accounting, and delivery of said livestock, as a carrier under its published tariffs, and is based upon the reasonable cost (plus a reasonable percentage for overhead, supervision, and profit) of the performance of such services and the rental of necessary and suitable facilities. In case of a change in the services required to be performed by the railroad company under its published tariff, or in case of a change in the reasonable cost to this company of the performance of the services so required to be performed for the railroad company, the rates of compensation may be changed to reflect such changed conditions.

The entire amount of such compensation will be retained by this Company, and no portion thereof will be paid directly or indirectly by it to any shipper or consignee of livestock handled at the Cleveland Union Stock Yards.

This Company is not interested as a shipper or consignee in any livestock in respect of which services are offered.

These services are offered beginning June 1, 1940, and this offer will be deemed a continuing offer until withdrawn and cancelled by thirty (30) days' notice in writing, or until superseded by an express contract between the railroad company and this Company.

524 This Company will at all times during the continuance of this offer cooperate with the railroad company in respect to the prompt loading and unloading of livestock into or from the cars placed by the railroad for that purpose, and will comply with such reasonable rules and regulations as may from time to time be established by the railroad company in that regard, to the intent that the operations of the railroad company may be facilitated and congestion avoided.

Yours truly,

LIVESTOCK TERMINAL SERVICE COMPANY,

(Signed) M. S. FARMER, *Secretary*.

MSF:W.

525

APPENDIX H

THE NEW YORK CENTRAL RAILROAD COMPANY

F. F. Riefel, Assistant Vice President & General Manager.

CLEVELAND, May 28, 1940.
D-kb

LIVESTOCK TERMINAL SERVICE COMPANY,
3200 W. 65th St., Cleveland, Ohio.

GENTLEMEN: This acknowledges receipt of your offer of May 23, 1940, to perform services at the Cleveland Union Stock Yards upon shipments of livestock delivered to or shipped from said point over the lines of railroad of this company.

As a temporary arrangement, in order to prevent interruption of service in the handling of such livestock and pending decision by the Interstate Commerce Commission of the several controversies concerning receipt and delivery of livestock at Cleveland, Ohio, and more particularly, those involved in Dockets Nos. 28400 and 28421 now pending before the Interstate Commerce Commission at Washington, D. C., this company is willing to accept the proposal outlined in your letter with the qualifications hereinafter made.

It is understood that this acceptance of your proposal so qualified does not constitute an admission that this Company is obligated under its road-haul rates, its tariffs, or otherwise, to perform any or all of the services stated in your letter or to pay any or all of the compensation therein stated.

All rights to deny the obligations of this Company to perform any or all of such services, and to deny our liability for any and all of said compensation are expressly reserved.

Under the circumstances, payments in accordance with your proposal will be made under protest, subject to the qualifications and reservations above set out.

You are advised that this company, along with the other railroads serving Cleveland, Ohio, will take the position that the Livestock Terminal Service Co. in the performance of the services required to be performed by carriers under their tariffs and by the laws of the State of Ohio or of the Federal Government will do so as a common carrier subject to the provisions of the Interstate Commerce Act.

This company also reserves the right to terminate this agreement by giving to your company notice in writing of its intention so to do not less than thirty (30) days prior to the date set in said notice for such termination.

Yours very truly,

(Signed) F. F. RIEFEL,
Asst. Vice Pres. & General Manager.

526

APPENDIX III

This Agreement, made and concluded this twenty-first day of May 1940, at Cleveland, Ohio, by and between The Cleveland Union Stock Yards Company, hereinafter called the Stock Yards Company, and Livestock Terminal Service Company, hereinafter called the Service Company, both being corporations organized and existing under the laws of the State of Ohio, with their principal offices and places of business at Cleveland, in Cuyahoga County, Ohio;

Whereas, The Stock Yards Company was organized for the purpose of and is engaged primarily in the business of conducting and operating a public livestock market and furnishing stockyard facilities and services, which have been and are furnished in accordance with the provisions of the Packers and Stockyards Act, 1921, as amended, and

Whereas, The Stock Yards Company has used or permitted the use of certain of its facilities and has performed certain services under arrangements with the several railroads serving Cleveland, Ohio, in connection with the receipt, loading, unloading, handling, storage, and delivery to consignees of livestock shipped for, or destined to, or stopped in transit at the Cleveland Union Stock Yards operated by the Stock Yards Company, which services are considered to be and are defined as "transportation" by the Interstate Commerce Act; and

Whereas, The Stock Yards Company desires to confine its business to the conduct and operation of a public market for livestock and the furnishing of stockyards services within the meaning of the Packers & Stockyards Act, 1921, as amended; and desires to cease and discontinue furnishing transportation services within the meaning of the Interstate Commerce Act as amended, or other accessorial services required for the care, handling and storage of livestock while awaiting shipment or delivery to consignee; and

Whereas, The Service Company was organized for the purpose of furnishing, as an independent contractor, all services in connection with the handling of livestock shipped from or

527 to, or while in transit at, public stockyards, that are incumbent upon railroads under their published tariffs, or incumbent upon railroads as common carriers or warehousemen, including receipt, loading, unloading, handling, storage, and delivery to consignees; and desires to contract with the Stock Yards Company for the use of facilities heretofore used or as may from time to time be reasonably necessary for such purpose, and the right to engage in the business for which it was organized, and perform the services heretofore performed by the Stock Yards

Company in connection with the transportation and delivery to consignees of livestock at the Cleveland Union Stock Yards in Cleveland, Ohio; and

Whereas, The Stock Yards Company desires to enter into a contract with the Service Company for the efficient use of necessary and suitable facilities, the furnishing of reasonable services, and the economical employment of labor to the end that livestock shipped from or delivered to, or stopped in transit at, the Cleveland Union Stock Yards in Cleveland, Ohio, may be received, loaded, unloaded, handled, cared for, and delivered in a proper manner in accordance with the usage of this particular stockyard; now, therefore, this agreement witnesseth:

That the parties hereto, for and in consideration of the promises and agreements on the part of the parties respectively hereinafter contained, do covenant and agree with each other as follows:

I. The Stock Yards Company shall and does hereby agree to—

1. Provide and maintain necessary, suitable, and convenient faciilties for the handling of livestock while awaiting shipment or delivery to consignees, including loading and unloading platforms, chutes and alleys; holding and storage pens; feeding, watering, and resting facilities; weighing facilities; and alleys or other means whereby livestock may be received for shipment or removed by the consignee after delivery; Provided, however, That the Stock Yards Company shall not be required to provide any particular pen, alley, chute, or other facility, and may designate the facilities which are to be used, and which may at other times be used by the Stock Yards Company for other purposes.

2. Permit the use by the Service Company of such of the facilities of the Stock Yards Company as may be reasonable and necessary for the receiving from consignors, shipment, loading, unloading, care, handling, and storage while awaiting ship-
328 ment or delivery, and delivery to consignees, of all livestock shipped from or destined to, or stopped in transit at, or which the railroads may desire to have handled at the Cleveland Union Stock Yards in Cleveland, Ohio; and grant to the Service Company the right and privilege of engaging in the business of furnishing the aforesaid services at the Cleveland Union Stock Yards as agent of the several railroads serving Cleveland, it being understood that the Service Company shall not act as agent or employee of the Stock Yards Company in the performance of said services.

3. Provide and furnish the Service Company adequate and suitable office space and office furniture in the Livestock Exchange Building operated by the Stock Yards Company at 3200 West 65th Street in Cleveland; and provide and furnish customary

heating, lighting, electricity for ordinary office equipment, and janitor service, and one telephone extension from the switchboard of the Stock Yards Company to be used for local calls.

4. Furnish necessary lighting on loading and unloading platform, in alleys and pens to enable the Service Company to perform the services herein contemplated during times when artificial lighting is necessary.

5. Furnish, as required, wholesome water for watering all livestock held by the Service Company, for showering hogs while awaiting delivery or drenching hogs after loading preparatory to shipment, and for cleaning facilities.

6. Keep the facilities used by the Service Company in proper condition for the uses herein contemplated, make all necessary repairs, and clean and disinfect facilities when required by sanitary regulation; Provided, however, That the Service Company shall pay the Stock Yards Company the reasonable cost of cleaning and disinfecting chutes, alleys, or pens made necessary by the handling of diseased livestock.

7. Provide watchman services and insure all livestock while in the possession of the Service Company against all losses due to or resulting from fire, lightning, or tornado.

8. Furnish wholesome feed of suitable kind, and feed livestock upon orders from the Service Company, subject to the same rules and rates of charges as are currently applicable in connection with livestock received for sale upon the public market conducted by the Stock Yards Company.

9. Maintain suitable weighing facilities and, when requested by the Service Company, accurately weigh livestock shipments on the hoof and furnish the Service Company with duplicate copies of the scale tickets showing the weighing and identifying information.

10. Furnish accounting, clerical, or messenger service when, as, and if required by the Service Company, at rates of compensation to be mutually agreed upon from time to time, such services to be under the exclusive supervision and direction of the Service Company.

11. Supply skilled stockyard labor when, as or if requested by the Service Company to handle an unexpected or unusual volume of livestock at cost of labor plus 10% for overhead, such labor to be under the exclusive supervision and direction of the Service Company.

529 12. Utilize when, as, or if available and needed, the services of any of the personnel of the Service Company in order to keep operating expenses at a minimum, and compensate the Service Company for such services upon the basis of cost of similar services.

II. The Service Company shall and does hereby agree to—

1. Use the facilities provided and designated from time to time by the Stock Yards Company in a careful manner to avoid damage, and compensate and save harmless the Stock Yards Company from any loss or damage due to or resulting from the negligent or improper use of the facilities by the Service Company.

2. Perform the services contemplated herein in the customary manner and so as not to unduly interfere with the business of the public livestock market conducted by the Stock Yards Company, and save harmless the Stock Yards Company from any loss or damage due to or resulting from the negligent performance of the services herein contemplated in and upon the premises of the Stock Yards Company.

3. Conserve water, heat, electricity, cleaning, repairs, and use of facilities as much as reasonably possible consistent with reasonable service.

4. Provide and maintain, if and when required by the Stock Yards Company, surety bond or public liability insurance to adequately protect the Stock Yards Company from loss or damage due to or resulting from the performance or the failure to perform, or the manner of performance, by the Service Company of services herein contemplated.

5. Pay to the Stock Yards Company on or before the 10th day of each month as compensation for the use of facilities, the privilege of conducting its business, and the services furnished by the Stock Yards Company during the preceding calendar month, the following:

(a) For privilege of conducting business and the use of facilities:

(1) Each deck of livestock shipped from or to the public market by railroad, $2.00.

(2) Each deck of livestock consigned direct to packer and not offered for sale on the public market, $3.50.

(3) Each deck of livestock stopped for feed, water and rest, $1.00 when fed in cars: $3.00 when fed in pens.

(4) Each head of other livestock shipped from or to the stockyards, $0.25.

(5) Each deck or part thereof of livestock held in storage pens awaiting shipment or delivery longer than twenty-four (24) hours, exclusive of Sundays or legal holidays, $1.00 for each 24 hours or fraction thereof.

530 (b) Miscellaneous services furnished by the Stock Yards Company:

(1) Feeding—the charges applicable to market livestock.

(2) Weighing—twenty (20) cents per draft; minimum 50¢ per deck.

(3) Cleaning and disinfecting chutes, alleys, or pens made necessary by reason of the handling of diseased livestock—the reasonable cost of labor and material for such cleaning and disinfecting.

(4) Other services will be performed under special contracts.

III. The Stock Yards Company and the Service Company shall and do hereby agree that—

1. During the life of this agreement neither party shall interfere with or engage in a business similar to or competitive with the business of the other party.

2. The compensation provided herein may be changed as follows:

In case of a change in the services required to be performed by the Service Company under its contract with the railroads, or in case of a change in the character, extent, or value of facilities required, or in the reasonable cost to the Stock Yards Company of the performance of the services so required to be performed by the Service Company, the reasonable compensation for the use of facilities and the reasonable cost, plus a reasonable percentage for overhead, supervision, and profit, of the performance of these services shall be agreed upon by the President of the Service Company and by the President of the Stock Yards Company, and set forth in an amended or substituted schedule to be attached hereto.

Any disagreement between the Service Company and the Stock Yards Company as to the reasonable compensation for the use of facilities or cost of the performance of such service or as to the reasonable percentage for overhead, supervision or profit shall be determined by arbitration as hereinafter provided.

Matters requiring arbitration shall be submitted to the arbitrament of the officer in charge of the administration of the Packers and Stockyards Act, 1921, or a person designated and appointed by such officer. The party desiring such arbitration shall give written notice thereof to the other party, and to the officer in charge of the administration of the Packers and Stockyards Act, and shall state precisely the matter or matters which it is proposed to bring before the arbitrator. The other party may within ten (10) days after the receipt of such notice, also state additional matters subject to arbitration to be then arbitrated, such statement also to be in writing. Only matters so stated by the parties shall be considered or decided by the arbitrator.

531 The arbitrator, as soon as possible after such notice, shall meet with the President of the Stock Yards Company and the President of the Service Company to consider the questions submitted to him, and shall give to each party reasonable notice of the time and place of such meeting. After hearing both parties and taking such testimony and making further investigation as

he may see fit, the arbitrator shall make in writing his award upon the question or questions submitted to him, and shall serve a copy of such award upon each party, and the written award signed by such arbitrator shall be final and binding upon the parties hereto, and each shall promptly conform thereto.

The books and papers of both parties, so far as they relate to matters submitted to arbitration, shall be open to the examination of the arbitrator. All expenses shall be apportioned equally between the parties.

Until the arbitrator shall make his award upon the questions submitted to him, the business to be transacted under this agreement shall continue to be transacted in the manner and form existing prior to the arising of such questions.

Either party dissatisfied with the award of the arbitrator may, upon sixty (60) days' written notice, cancel and terminate this agreement.

3. This agreement shall continue until amended or cancelled by mutual agreement or until terminated by either party upon sixty (60) days' written notice to the other party.

In witness whereof, the parties have hereunto set their hands to duplicates hereof the day and year first above written.

THE CLEVELAND UNION STOCK YARDS COMPANY,
(Signed) A. Z. BAKER, *Its President.*
LIVESTOCK TERMINAL SERVICE COMPANY,
(Signed) C. B. HEINEMANN, *Its President.*

In the presence of
(Signed) PHILIP H. COAD.
(Signed) M. S. FARMER.

532 ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of April A. D. 1941

Ex Parte No. 127

Status of Public Stock Yard Companies

It appearing, that by order dated July 11, 1938, as amended, on August 4, 1939, and July 18, 1940, the Commission on its own motion instituted an investigation into and concerning the status of the public stockyard companies named in said orders and of Livestock Terminal Service Company and Fort Worth Livestock Handling Company, as common carriers by railroad subject to the Interstate Commerce Act, in respect of the transportation services performed at said stockyards, in connection with the unloading

and loading of carload shipments of livestock transported by railroad in interstate commerce to and from the public stockyards of certain stockyard companies; and the relations between said companies and (a) common carriers by railroad subject to the Act, and (b) any person, firm, or corporation receiving at or shipping from said stockyards livestock transported by railroad in interstate commerce to and from the said stockyards;

It further appearing, that a full investigation of the matters and things involved has been had, and that said stockyard companies and Livestock Terminal Service Company and Fort Worth Livestock Handling Company have been fully heard, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that St. Paul Union Stock Yards Company, West Philadelphia Stock Yard Company, Pittsburgh Joint Stock Yards Company, The Denver Union Stock Yard Company, Portland Union Stock Yards Company, Union Stock Yards Company of Seattle, South San Francisco Union Stockyards Company, San Francisco and Stockton, Calif., Los Angeles Union Stock Yards Company, The Cincinnati Union Stock Yard Company, Bourbon Stock Yard Company, The Jersey City Stock Yards Company, The Cleveland Union Stock Yards Company and Livestock Terminal Service Company, Union Stock Yard and Market Company, Incorporated, Fort Worth Livestock Handling Company, The New York Central Railroad Company, and the Michigan Central Railroad Company, be, and they are hereby notified and required to publish and file tariff schedules showing the charges assessed and collected for the loading and unloading of interstate shipments of livestock transported to and from the said public stockyards, on or before July 10, 1941, upon notice to this Commission and to the general public by not less than thirty days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act;

And it is further ordered, that this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

533 *Exhibit No. 8*

Reproduction of Exhibit 312 filed in Ex Parte 127, covering a lease agreement between the Cleveland Union Stock Yards Company and Livestock Terminal Service Company.

534 LEASE AGREEMENT

This Lease Agreement made at Cleveland, Ohio, this 31st day of May A. D. 1941, by and between The Cleveland Union Stock Yards Company, the Lessor, hereinafter called the Stock Yards Company, and Livestock Terminal Service Company, the Lessee, hereinafter called the Service Company, both corporations organized and existing under the laws of the State of Ohio with their principal offices and places of business in Cleveland, Cuyahoga County, Ohio; witnesseth that:

Whereas, the Stock Yards Company was organized for the purpose of, and is engaged primarily in the business of conducting and operating a public livestock market and furnishing stockyard facilities and services which have been and are furnished in accordance with the provisions of the Packers and Stockyards Act, 1921, as amended, and desires to confine its business to the conduct and operation of a public market for livestock and the furnishing of stockyard services within the meaning of the Packers and Stockyards Act, 1921, as amended; and

Whereas, the Service Company was organized for the purpose of furnishing, as an independent contractor all services in connection with the handling of livestock shipped from or to, or while in transit at, public stockyards that are incumbent upon railroads under their published tariffs, or as common carriers or warehousemen, including receipt, loading, unloading, handling, storage, and delivery to consignee; and desires to lease from the Stock Yards Company suitable and necessary facilities for such purpose, and to obtain the right to engage in business for which it was organized, and perform services in connectio with the receipt and delivery of carload shipments of livestock at the Cleveland Union Stock Yards in Cleveland, Ohio; and

535 Whereas, the Stock Yards Company owns certain land, platforms, chutes, pens, alleys, and driveways which are suitable and have been used for or in connection with the receipt, loading, unloading, care, handling, storage, and delivery of livestock transported by railroad in carloads to or from the Cleveland Union Stock Yards in Cleveland, Ohio; and

Whereas, the railroads serving Cleveland, Ohio, have failed to provide suitable facilities or to perform the duty imposed by the Interstate Commerce Act in connection with the receipt, loading, unloading, care, handling, storage, and delivery of livestock at Cleveland, Ohio; and have in the past employed the Stock Yards Company, and now employ the Service Company, to provide suitable facilities and perform the necessary services; and

Whereas, the Stock Yards Company is willing, and by this agreement proposes, to lease to the Service Company for its exclusive use and operation suitable facilities for the furnishing of services in connection with the receipt, loading, unloading, handling, care, storage, and delivery of livestock shipped from, to, or stopped in transit at, the Cleveland Union Stock Yards in Cleveland, Ohio.

Now, therefore, the parties hereto, for and in consideration of the promises and agreements on the part of the parties respectively hereinafter contained, do covenant and agree with each other as follows:

I. The Stock Yards Company does hereby let and lease unto the Service Company the premises situated in the City of Cleveland, County of Cuyahoga and State of Ohio, and known as being a part of the property of the Cleveland Union Stock Yards Company, situated on the westerly side of West 65th Street and along the southeasterly line of the right-of-way of the New York Central Railroad Company, and more particularly described and designated on a plat attached hereto and made a part hereof, showing in red the premises and facilities hereby leased; and the
336 Stock Yards Company also grants the use during the term of this lease of certain right-of-ways or easements over or through alleys and driveways designated and shown in yellow on said plat.

To have and to hold unto the Service Company for a term of one (1) year commencing on the 1st day of June 1941, and ending on the 31st day of May 1942, upon the covenants and agreements herein set forth.

II. The Service Company hereby covenants and agrees to—

(1) Pay to the Stock Yards Company as rent for said premises during said term, a sum of Eighteen Thousand Dollars ($18,000.00) per year, in monthly installments of Fifteen Hundred Dollars ($1,500.00) each, on or before the tenth day of each month during said term;

(2) Use said premises for the purpose of receiving from consignors, shipping, loading, unloading, care, feeding, watering, handling, storage, and delivery to consignees of carload shipments of livestock, and for no other purpose, it being specifically understood that said premises are not to be used, conducted, or operated as a public livestock market in competition with the public market conducted and operated by the Stock Yards Company;

(3) Maintain and keep said premises and appurtenances in good order and repair and in a reasonably clean, safe, and sanitary condition according to City, State, and Federal ordinances and laws, comply with the directions of the proper public officers

as to use, repair, maintenance, cleaning, and disinfection of such premises, and upon the expiration of this lease or its termination in any way, deliver up and surrender to the Stock Yards Company possession of the premises hereby leased in as good condi-
537 tion and repair as the same shall be at the commencement of said term, loss by fire and ordinary wear and decay only excepted;

(4) Use and occupy said premises and appurtenances in a careful, safe, and proper manner, and not allow said premises to be used for any purpose or in any way that will raise the rate of insurance thereon or increase the hazard of fire in or on said premises;

(5) Use said premises for the purposes contemplated, in a careful manner to avoid damage and undue interference with the business of the Stock Yards Company, and compensate and save harmless the Stock Yards Company for any loss or damage due to or resulting from the negligent or improper use of the facilities, or performance of services contemplated;

(6) Pay, in addition to rents herein specified, all water rents levied or charged against said premises during the term for which this lease is granted, and in case no water rents are levied or charged specifically against said premises, pay to the Stock Yards Company water rent at city rates for the amount of water used during such term, and also pay to the Stock Yards Company for all light, fuel, and power furnished during the term of this lease;

(7) Permit the Stock Yards Company to have free access to the premises at all reasonable times for the purpose of examining the same, or to make alterations or repairs to the buildings deemed necessary for safety or preservation, or the construction of additional sewer, water, electric lines, or other facilities;

(8) Not sublet said premises or any part thereof, or assign this lease, without first securing the written consent of the Stock Yards Company in each case;

538 (9) Allow the Stock Yards Company, if default be made in payment of said rent or any part thereof, or in fulfillment of any of the covenants or agreements herein specified to be fulfilled by the Service Company, or if any waste be committed or unnecessary damage done upon or to said premises, at any time while such default continues, or before the replacement or repair of such waste or damage, without notice, to declare the said term ended and enter into possession of said premises, and sue for and recover all rents and damages accrued or accruing under this lease or arising out of any violation thereof, or sue and recover without declaring this lease void or entering into possession of said premises.

III. The Stock Yards Company and the Service Company shall and do hereby agree that—

(1) During the term of this lease neither party shall interfere with or engage in a business similar to or competitive with the business of the other party;

(2) The rent provided herein may be changed as follows: In case of a material change in the reasonable value of the premises hereby leased, the reasonable rate of return, the amount of taxes assessed or other factors entering into the rent, or in the case of a material change in the extent or type of facilities necessary to perform reasonable service, a reasonable rent shall be agreed upon by the President of the Service Company and the President of the Stock Yards Company, and set forth in an amended or substituted schedule to be attached hereto. Any disagreement between the Service Company and the Stock Yards Company as to the reasonable rent shall be determined by arbitration as here-
339 inafter provided. Matters requiring arbitration shall be submitted to be arbitrament of the officer in charge of the administration of the Packers and Stockyards Act, 1921, or a person designated and appointed by such officer. The party desiring such arbitration shall give written notice thereof to the other party and to the officer in charge of the administration of the Packers and Stock Yards Act. He shall state precisely the matter or matters which it is proposed to bring before the arbitrator. The other party may within ten (10) days after the receipt of such notice also state additional matters subject to arbitration to be then arbitrated, such statement also to be in writing. Only matters so stated by the parties shall be considered or decided by the arbitrator. The arbitrator, as soon as possible after such notice, shall meet with the President of the Stock Yards Company and the President of the Service Company to consider the questions submitted to him, and shall give to each party reasonable notice of the time and place of such meeting. After hearing both parties and taking such testimony and making further investigation as he may see fit, the arbitrator shall make in writing his award upon the question or questions submitted to him, and shall serve a copy of such award upon each party, and the written award signed by such arbitrator shall be final and binding upon the parties hereto, and each party shall promptly conform thereto. The books and papers of both parties, so far as they relate to matters submitted to arbitration, shall be opened to the examination of the arbitrator. All expenses shall be apportioned equally between the parties. Until the arbitrator shall make his award upon the questions submitted to him, the rental prescribed herein shall be continued.

540 (3) This lease, upon expiration, shall be automatically extended by one year, from May 31st, 1942, and thereafter from year to year, unless either of the parties hereto shall, at least one month before such expiration date, give to the other notice in writing of the termination of the lease as of May 31st, 1942, or as of May 31st of any subsequent year.

(4) This lease agreement may be terminated, cancelled, and avoided at the option of either party in the event the railroads serving Cleveland terminate their contract or contracts with the Service Company and no longer employ the Service Company to perform services in connection with the receipt, loading, unloading, care, handling, storage, and delivery of livestock at the Cleveland Union Stock Yards. Upon such termination, cancellation, and avoidance, both parties hereto shall be released from all obligations arising under this agreement except those which have accrued or arisen before the time and date of cancellation.

In witness whereof, the parties hereto by their respective officers have subscribed to duplicates hereof on the 31st day of May A. D. 1941.

THE CLEVELAND UNION STOCK YARDS COMPANY,
By A. Z. BAKER, *Its President.*
LIVESTOCK TERMINAL SERVICE COMPANY,
By C. B. HEINEMANN, *Its President.*

In the presence of
PHILIP H. COAD
M. S. FARMER

STATE OF OHIO,
Cuyahoga County.

Before me, A Notary Public in and for said County and State, personally appeared the above-named The Cleveland Union Stock Yards Company by A. Z. Baker, its President, who acknowledges that he did sign the foregoing instrument and that the same is the free act and deed of said corporation, and the free act and deed of such officer.

In witness whereof, I have hereunto set my hand and official seal at Cleveland, Ohio, this 31st day of May A. D. 1941.

J. P. CARPENTER, *Notary Public.*

541 *Exhibit No. 9*

(Sheet 1 of 4 sheets.)

CLEVELAND, OHIO,
January 25th, 1945.

By mutual consent of the parties and effective as of February 1st, 1935, the certain agreement dated June 16th, 1924, between The Cleveland, Cincinnati, Chicago & St. Louis Railway Company,

predecessor to The New York Central Railroad Company, lessee of the railroad and property of said Railway Company, and the Cleveland Union Stock Yards Company, relating to certain sidetracks at Cleveland, Ohio, located as shown on plan dated June 26th, 1924, attached to said agreement and made a part thereof, is hereby modified and amended to read, as follows:

"Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, except for competitive traffic a charge for which use shall be the subject of a separate agreement, of any and all tracks or portions thereof belonging to the Industry and located on its land."

Signed by the parties in duplicate as of the day and year first above written.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company.
By W. F. SCHAFF, *Vice President and General Manager.*
THE CLEVELAND UNION STOCK YARDS COMPANY,
By A. Z. BAKER, *President.*

W. N. K.

542 (Sheet 2 of 4 sheets.)

This Agreement, made and entered into in duplicate this sixteenth (16th) day of June 1924, by and between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, hereinafter called the "Railroad" and The Cleveland Union Stock Yards Company, a corporation, as Second Party, hereinafter called the "Industry"; witnesseth:

Whereas, said Industry and/or its predecessor company or companies entered into certain written agreements with said Railroad hereto respecting a large number of the tracks serving the Industry's plant at Cleveland, Cuyahoga County, Ohio, and

Whereas, is it the mutual desire to enter into a formal written agreement respecting certain of the tracks or portions thereof covered in two of the agreements already executed and also including certain portions of other tracks not heretofore covered by written agreement between the parties hereto.

Now, therefore, in consideration of One Dollar ($1.00) in hand paid by each party to the other, the receipt of which is hereby acknowledged, and of other valuable considerations, it is mutually agreed as follows:

First. That the blueprint hereto attached dated June 26, 1924, and made a part of this agreement, shows the system of tracks serving the Industry's plant at Cleveland, Cuyahoga County, Ohio, the tracks to be particularly covered by this agreement to include tracks Railroad's Valuation Numbers 245, 246, 247, 254, 255, and 256.

Second. The Railroad does and shall continue to own the following tracks and portions thereof.

(a) The southwesterly and westerly about 793-foot portion of Track No. 245 and also the 132-foot portion of said track from its point of switch in the Railroad's sidetrack to the Railroad right-of-way line.

(b) All of Track No. 246, about 1,624 feet in length.

(c) All of Track No. 247, about 1,359 feet in length.

543 (Sheet 3 of 4 sheets.)

(d) The southerly about 172-foot portion of Track No. 254.

(e) The southerly about 637 feet of Track No. 255.

(f) All of Track No. 256, about 357 feet in length.

Said tracks and portions of tracks are colored red on said blueprint.

Third. The Industry does and shall continue to own the following tracks or portions thereof.

(a) The about 1,619 feet of Track No. 245 extending from the Railroad right-of-way southwardly to the point of Big Four ownership in said track.

(b) The northerly about 649 feet of Track No. 254.

(c) The northerly about 180 feet of Track No. 255.

Said portions of tracks are colored green on said blueprint.

Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land.

Fifth. It is understood that the movement of Railroad's locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad's negligence, arising from fire caused by locomotives operated by the Railroad on said tracks, or in their vicinity for the purpose of serving said Industry, except to the premises of the Railroad and to rolling stock belonging to the Railroad or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless the Railroad for loss, damage, or injury from any act or omission of the Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said tracks; and if any claim or liability, other than from
544 fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.
(Sheet 4 of 4 sheets.)

Sixth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect; such notice on the part of the Railroad may, at its option, be given by posting it upon a conspicuous part of the premises, and this agreement, in such case, shall terminate thirty (30) days after such posting; after which period either party may remove all property belonging to it under this agreement, except as herein otherwise provided.

Until terminated, as above provided, this agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors, and assigns, of the parties hereto: Provided, however, That, as to the Industry, no assignment of this agreement shall be valid without the written consent of the Railroad.

Seventh. This agreement shall cancel and entirely supersede the contract between the parties hereto dated May 10th, 1899, relating to portions of tracks numbers 245 and 254, as well as agreement of January 11th, 1905, relating to portions of Track 246 and 247.

In witness whereof, the parties hereto have caused this agreement to be executed in duplicate the day and year first above written.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,
By (Sgd.) C. S. MILLARD, *General Manager.*

The CCC & St. L. Ry. Co.
Approved:
(Sgd.) H. N. QUIGLEY, *Gen'l Atty.*
(Sgd.) HADLEY BALDWIN, *Chief Engineer.*
(Sgd.) B. C. BYERS, *General Supt.*
(Sgd.) T. J. HAYES, *Superintendent.*

THE CLEVELAND UNION STOCKS YARDS COMPANY,
By (Sgd.) E. A. MURPHY, *President.*

Attest:
(Sgd.) ALLEN S. WALTZ, *Secretary.*

546 *Exhibit No. 10*

Explanation of Pages of Complainant's Exhibit

Page 1—Explanation.

Pages 2, 3, and 4.—Chronological statement of switching charges and reciprocal switching at Cleveland, Ohio, on CCC & St. L. (NYCRR lessee).

Page 5—Listing of packing houses appearing in CCC & St. L. (NYCRR lessee) current tariff located at Cleveland, Ohio.

547 Chronological Statement Showing Tariff Listing of People's Provision Co., People's Packing Co., and Swift & Co. as Industries on Cleveland, Cincinnati, Chicago and St. Louis R. R. or its Successor Company, New York Central Railroad

Date effective	Tariff	Industry shown
4-23-04	CCC & ST. L. 415, ICC 2153, $2.50 reciprocal switching	People's Provision Co.p.11.
7-27-07	CCC & ST. L. 47A and 62 ICC 3708, $2.50 reciprocal switching	People's Packing Co.
7-15-09	CCC & ST. L. 47B, ICC 4800, $2.50 reciprocal switching	People's Packing Co. grade.
7- 1-10	CCC & ST. L. 47C, ICC 5344, $2.50 reciprocal switching	Do.
4-15-11	CCC & ST. L. 47D, ICC 5695, $2.50 reciprocal switching	Do.
10- 1-11	CCC & ST. L. 1, ICC 5873, $2.50 reciprocal switching	Do.
7- 1-12	CCC & ST. L. 1-A, ICC 6034, $2.50 reciprocal switching	Do.
9- 1-14	CCC & ST. L. 1-B, ICC 6354, $2.50 reciprocal switching	Do.
548		
2- 2-15	Supplement 19 CCC & St. L 1-B, ICC 6354 $2.50 reciprocal switching.	Swift & Co., People's Packing Co, grade.
8- 1-16	CCC & St. L. 1-C, ICC 6739, $2.50 reciprocal switching	Do.
12-30-18	CCC & St. L. 1-D, ICC 7218, $2.50 reciprocal switching	Do.
8-26-20	CCC & St. L. 1-E, ICC 7526, $2.50 reciprocal switching	Do. [1]
10- 1-21	CCC & St. L. 1-F, ICC 7758, $2.50 reciprocal switching	Swift & Co. grade.
7-31-22	CCC & St. L. 1-G, ICC 7886, $2.50 reciprocal switching	Swift & Co. upper grade.
6-15-24	CCC & St. L. 1-H, ICC 8094, $2.50 reciprocal switching	Do.
12-25-25	CCC & St. L. 1-J, ICC 8289, $2.50 reciprocal switching	Do.
9- 5-27	CCC & St. L. 1-J, ICC 8385, $3.15 reciprocal switching	Do.
549		
11- 1-28	CCC & ST. L. 1-k, ICC 8450, $3.15 reciprocal switching	Do.
5-15-30	CCC & ST. L 1-L, ICC 8532, $3.15 reciprocal switching	Do.
11- 5-31	CCC & ST. L 1-M, ICC 8602, $3.15 reciprocal switching	Do.
11-30-36	CCC & ST. L 1-N, ICC 8785, $3.15 reciprocal switching	Do.
3-28-38	X123 reciprocal switching increased to $3.47	
11-12-38	Supplement 44 CCC & St. L. 1-N, ICC 8785, $3.47 reciprocal switching restricted to not apply on livestock. 5-18-44	Do. Do.
9-15-43	NYC RR 20, ICC 499, $3.47 reciprocal switching not applicable on live stock.	Swift & Co., NYC-C.

[1] People's Packing Co. eliminated effective 9-26-20.
Present—Same tariff and basis.

550 PRESENT TARIFF N. Y. C. 20 I. C. C. 499 PAGES 118 TO 125 PROVIDES FOLLOWING ON RECIPROCAL SWITCHING

Federal Packing Co	⊕3. 47 C
Earl C. Gibbs Inc	⊕3. 47 C
Kohlenaer Bros	⊕3. 47 C
Kruisburg & Krasny	⊕3. 47 C
Lake Erie Provision Co. (Cleveland Provision Co.)	3. 47 C
Long Dressed Beef Co	3. 47 C
Ohio Provision Co	3. 47 C
Standard Beef Co	⊕3. 47 C
Swift & Co	⊕3. 47 C
Theurer Norton Provision Co	⊕3. 47 C
Hughes Provision Co	⊕3. 47 C

Explanation of references

C. Means N. Y. C. (C) as provided in tariff and indicates the district in which located. Explained on page 34 of tariff as being New York Central R. R. Co., The Cleveland, Cincinnati, Chicago and St. Louis District.

⊕ Not applicable on livestock.

551 *Exhibit No. 11*

STIPULATION

In Big Four File No. 44540, entitled "Peoples Packing Company," found in the office of Mr. J. E. Anderson, Freight Traffic Manager, New York Central System at Cleveland, Ohio, are various communications between A. R. Fay, Traffic Manager, Swift & Company, and traffic officers of the C. C. C. & St. L. Railway Company, beginning September 14, 1907 and continuing to April 26, 1912, referring to the early stages of providing a sidetrack for the Peoples Packing Company (a predecessor of and purchased by Swift & Company, January 24, 1905) and also for Theurer Norton Packing Company, Blumenstock & Reid, and an unnamed packing company located, or then locating, along West 63rd Street, known as Prim Avenue during 1907 and for some time thereafter. The earliest dated letter in the file is one written September 14, 1907, by A. R. Fay, representing the Traffic Department of Swift & Company, to Mr. B. B. Mitchell, General Freight Traffic Manager, New York Central Lines, Chicago, Ill., reading as follows:

"I enclose herewith a diagram, which will explain the situation at Cleveland regarding the Peoples Packing Company.

"The track along Prim Street would serve four industries, of which the out and in business, I have estimated, would run from 150 to 175 cars (loaded) per week. This traffic goes east, south, and west and I find G. H. Ingalls knows something of this track matter."

Next on top in the file is a diagram, marked "Stipulation Exhibit A," which apparently accompanied Mr. Fay's letter of September 14, 1907. Numerous conferences are indicated to have been held following Mr. Fay's letter of September 14, 1907, between Mr. Fay, Traffic Manager of Swift & Company and officers of the C. C. C. & St. L. Ry. Co., following which the Peoples Packing Com-
552 pany apparently obtained an Ordinance, No. 10944, from the Council of the City of Cleveland, dated May 25, 1908, granting to the C. C. C. & St. L. Rwy. Co. the right to construct a spur and sidetrack to be built over and along West 63rd Street to connect the C. C. C. & St. L. Rwy. main track with packing companies located and then locating along West 63rd Street. After this Ordinance to cross West 63rd Street and make a connection with the main track of the C. C. C. & St. L. Rwy. Co. was passed the Lake Erie Provision Company obtained a temporary restraining order, on June 5, 1908, which was later made permanent, restraining the C. C. C. & St. L. Rwy. Co. from constructing this spur track over and along West 63rd Street to connect what was referred to as the Prim Street track with the C. C. C. & St. L. Rwy. main track, based on the claim that the construction and operation over this spur track would cause irreparable injury and loss to the Lake Erie Provision Company.

Swift & Company, then owner of the Peoples Packing Company, continued its desire to construct this sidetrack along and across Prim Street and connecting directly with the main track of the C. C. C. & St. L. Rwy. Co. and requested the C. C. C. & St. L. Rwy. Co. to file a condemnation action against the Lake Erie Provision Company to procure land necessary to enable this connection to be made. Said action was filed in the Court of Insolvency of Cuyahoga County. At the May 1909 Term, the Court of Insolvency granted the petition of the railroad company to condemn part of the Lake Erie Provision Company land and awarded damages to the Lake Erie Provision Company in the sum of $13,500.00.

The Railroad Company was unwilling to construct this track unless the Peoples Packing Company and three other packing concerns who desired the track would pay the damages assessed in the condemnation proceedings. Through Swift & Co.
553 the Peoples Packing Company indicated its willingness to contribute $2,000.00 toward the construction of this track and three other packing concerns were reported willing to contribute $1,000.00, provided the track was built without further

delay and without waiting for the condemnation proceedings to be settled. See Mr. Fay's letter of July 30, 1909, marked "Stipulation Exhibit B" attached hereto. The total cost of building the track, damages awarded the Lake Erie Provision Company, and estimated damages for four additional parcels of land approximated $24,500.00. Further conferences ensued, as indicated by Mr. Fay's letter dated September 11, 1909. The Railroad Company was willing to bear the cost of constructing the track if the packing companies referred to above would assume the property damage, litigation costs, etc.

In March 1910, Swift & Company indicated to the Freight Traffic Manager of the C. C. C. & St. L. Ry. Co. that inasmuch as it seemed impossible to do anything with a connection direct from Prim Street, Swift & Company believed that some arrangement might be made to get a sidetrack into the Peoples Packing Company plant crossing West 65th Street, then known as Gordon Avenue. The railroad company indicated its willingness to build the track across West 65th Street if the Peoples Packing Company and other packers along West 63rd Street obtained permission to cross West 65th Street and furnished the right-of-way, with perpetual easement, for this track without cost. An Ordinance, No. 18748–A, was passed by the Council of the City of Cleveland on September 6, 1910, permitting the track to be built across West 65th Street by the C. C. C. & St. L. Rwy. Co. The right-of-way for this track east of the east line of West 65th Street was procured by Swift & Company and deeded to the C. C. C. & St.
354 L. Rwy. Co. with the exception of a small parcel of Sublot 166 adjoining the easterly line of West 65th Street and belonging to The Cleveland Union Stock Yards Company.

After this sidetrack connecting with the sidetracks on the property of the Cleveland Union Stock Yards Company west of West 65th Street was built across West 65th Street to the Peoples Packing Company the appropriation action against the Lake Erie Provision Company for connecting the proposed Prim Street Track with the C. C. C. & St. L. Rwy. main track was dismissed and Swift & Company, in a letter dated November 23, 1910, signed by A. R. Fay, Stipulation Exhibit "C" attached, and letter dated January 7, 1911, signed by A. R. Fay, Stipulation Exhibit "D" attached, agreed to pay $575.00, which was one-half of the amount which the railroad company agreed to pay the Lake Erie Provision Company in dismissing the appropriation proceedings.

555 *Stipulation Exhibit "B"*

SWIFT & COMPANY

Union Stock Yards

CHICAGO

JULY 30, 1908.

MR. G. H. INGALLS,
F. T. Mgr., New York Central Lines,
Chicago, Ill.

DEAR SIR: Replying to your letter of the 29th.

Our statement was that we thought the packers would contribute $5,000.00 towards the damages account of building the Prim Street track, and that if the others would give $3,000.00, or more, the Peoples Packing Co., would give enough to make up the $5,000.00, but not to exceed $2,000.00 in any case, provided the track was built without further delay and without waiting for the lawsuits to be settled.

This confirms what I have told you before and please say if it is satis.actory and if you will proceed on these lines.

Yours respectfully,

SWIFT & COMPANY,
Per (Sgd.) A. R. FAY.

R. R. Dept.
ARF.—DB.

556 *Stipulation Exhibit "C"*

SWIFT & COMPANY
Union Stock Yards
CHICAGO

Transportation Department.

NOVEMBER 23RD, 1910.

MR. GEO. H. INGALLS,
F. T. M., New York Central Lines,
Chicago, Ill.

DEAR SIR: Replying to your letter of the 12th inst., File 44540:

We hope and think you will be able to do better with the Lake Erie Provision Company than the amount mentioned in your letter. We are getting no assistance from the other packers in this matter and whatever is paid apparently the Peoples Packing Company will have to stand.

As stated to you verbally yesterday, the Peoples Packing Company paid $5,000.00 for four lots, in order to secure a right-of-way and give you easement over it. In view of this expense and the fact that we are getting no assistance from the other packers, Peoples Pkg. Company will very greatly appreciate a material reduction from the $1,150.00 amount for attorney's fees, if you can secure it for them.

Please reply.

Yours respectfully,

SWIFT & COMPANY,
Per (Signed) A. R. FAY.

ARF:B.

557 *Stipulation Exhibit "D"*

SWIFT & COMPANY
Union Stock Yards
CHICAGO

Transportation Department.

JANUARY 7TH, 1911.

MR. GEO. H. INGALLS,
F. T. M., New York Central Lines,
Chicago, Ill.

DEAR SIR: Your letter of the 3rd instant, dated Cincinnati.

Our Legal Department have agreed that I might accept your proposition of paying 50% of the $1,150.00 mentioned in your letter of November 12th, on account of the Peoples Packing Company. We will accept bill for that amount; namely, $575.00.

Yours respectfully,

SWIFT & COMPANY,
Per (Signed) A. R. FAY.

ARF:B.

P. S.—Please send the bill to me at this office under personal cover.

559 *Exhibit No. 14*

This Agreement, Made this Tenth day of May in the year 1899, between the The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a Corporation existing under and by virtue of the laws of Ohio and Indiana, as First Party, and The Cleveland Stock Yards Company, a Corporation existing under and by virtue of the Laws of the State of Ohio, as Second Party, witnesseth:

Whereas, The Second Party desires the construction of two (2) sidetracks at Cleveland, Ohio, as shown by attached plat which is made a part hereof.

Station on the Cleveland Division of the C. C. C. & St. L. Railway Company, in the county of Cuyahoga, State of Ohio, one of Said sidetracks to be connected with a sidetrack of the Division aforesaid, on the easterly side thereof, extending southwardly about seventeen hundred and fifty-one (1,751) feet, and the other one of said sidetracks to be the west side thereof, extending southwardly six hundred and forty-nine (649) feet, of which about one hundred and twenty (120) feet, shall be on the land of First Party, and about twenty-two hundred and eighty (2,280) feet on land owned and controlled by the Second Party.

Now, therefore, in consideration of one dollar and of benefits to the Second Party it is agreed between the parties, that the First Party will construct said sidetrack as above indicated, upon the following terms and conditions:

(1) Said Second Party shall do the necessary grading for said tracks at its own cost and expense.

(2) Said First Party to furnish all the necessary rails and proper fastenings including switches for said sidetracks, and lay the same.

560 (3) Before the commencement of the work said Second Party is to pay to said First Party an amount equal to the estimated cost of said sidetracks as named in article "two" and upon completion of the work, the difference between the actual cost and the estimated cost is to be paid by said Second Party to said First Party or, returned by said First Party to said Second Party as the case may be.

(4) Said Second Party will give to said First Party all its in- and out-bound business which it can control provided said First Party gives equal rates.

(5) Said sidetrack shall be maintained by the First Party, and the cost thereof shall be borne by the Second Party.

(6) The ownership of said track shall be vested as follows: The said one hundred and twenty (120) feet of track located on First Party's property to belong to said First Party; the remaining twenty-two hundred and eighty (2,280) feet (more or less) of said track to belong to said Second Party, and each party hereby disclaims ownership in any other portion of said sidetrack than as above designated, but the First Party shall have the right to use, without cost, the whole or any part of said siding in connec-

tion with other business than that of the Second Party, when the same is not occupied by the Second Party, when the same is not occupied by the Second Party, provided such use of the siding will not interfere with the business of the Second Party.

(7) The Second Party agrees that, without the written consent of the First Party, it will not direct or authorize the use of said track by or for the benefit of any other party not one of the parties hereto.

(8) The Second Party agrees to exercise the greatest care in the management of the siding herein provided for; to prevent cars or other obstructions from getting out upon or too close to the main or other tracks, to secure the safe closing and locking of the main switch, or switches, and to keep the inner safety switch (where such switch is provided), in proper position: also, to use such means and care, generally, as will tend to avoid accidents of any kind.

(9) The Second Party agrees that the First Party, its successors or assigns, shall have the right any time, after 60 days notice in writing to the Second Party, to discontinue the use of said sidetrack, to remove the connections, switches, and frogs upon the property of the First Party, and to enter upon the property of the Second Party, and take up and remove so much of said sidetrack belonging to the First Party as may be
561 located thereon; the First Party in such case to commit no unnecessary injury to the property of the Second Party.

(10) With full knowledge of the difficulty of preventing the emission of sparks and fire from engines and trains, it is expressly stipulated, agreed, and understood, that as a part of the consideration for the execution of this agreement, the Second Party is to assume all risk of fires and the danger thereof to any property or structure on account of the use of said sidetrack, to save harmless the First Party from all liability for damage by fire, to any such property or structure which in the operation of First Party's road may accidentally or negligently be communicated to any such property or structure, anything in any law of the state of Ohio to the contrary notwithstanding.

---------- lessor of Second Party hereby approves and adopts the foregoing agreement as his own, as far as assesses to himself.

In testimony whereof the parties hereto have caused this agreement to be executed in duplicate the day and year first above

written. The interlineations in the third, fourth and fifth lines of article "ten" were made before the execution hereof.

O. K. (S. O. B.).

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,

By (Signed) M. NUGNET (?), *President.*

THE CLEVELAND STOCK YARDS COMPANY,

[SEAL]

By (Signed) JOHN F. WHITELAW, *President,*

Attest:

(Sgd.) E. F. OSBORN, *Secretary.*

Attest:

(Sgd.) E. MURPHY, *Secretary.*

562 *Exhibit No. 15*

(Sheet 1 of 12 sheets.)

This Exhibit contains Sidetrack Agreement dated March 17th, 1938, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago, and St. Louis Railway, The Standard Beef Company, and The Cleveland Union Stock Yards Company.

563 (Sheet 2 of 12 sheets.)

PRIVATE SIDETRACK AGREEMENT

This agreement made this 17th day of March 1938, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway (hereinafter called the Railroad Company), party of the first part, and The Standard Beef Company, of the City of Cleveland, County of Cuyahoga, and State of Ohio (hereinafter called the Industry), party of the second part, and The Cleveland Union Stock Yards Company, party of the third part; witnesseth:

Whereas, the Industry has applied to the Railroad Company for a sidetrack connection with the Railroad Company's line of railroad in the City of Cleveland, County of Cuyahoga, and State of Ohio.

Now therefore, in consideration of the covenants and agreements herein contained, and the mutual benefits to be derived thereunder, the parties hereto agree that the said sidetrack has heretofore been constructed and shall be maintained subject to the following terms and conditions:

First. The term "track" as used herein includes all track, roadbed, bridges, and other supporting structures or appurtenances

used directly in connection therewith, shown in red and yellow colors on blue print No. C–7040–K3 dated Feb. 17, 1938, Rev. Mar. 9, 1938 hereto attached and made a part of this agreement.

564 (Sheet 3 of 12 sheets.)

(a) The Industry shall, without cost to the Railroad Company, provide the necessary right-of-way for the portion of the track extending beyond the Railroad Company's premises; procure and maintain in effect all grants, licenses, franchises, or permits necessary for the construction, maintenance, and operation of the track, in, upon, or across any public road, street, or other property or reservation which may be traversed or intersected thereby; assume the obligations imposed in or by reason of such grants, licenses, franchises, or permits, or hereafter imposed by law or other public authority in respect thereof including all taxes, assessments, and license fees, policing and the erection, maintenance, and operation of any crossing gates or other warnings or protection, and indemnify and hold harmless the Railroad Company from any and all cost and expense in connection therewith.

(b) The Industry, upon approval of the Railroad Company as provided in subparagraph (c) of this Section First may, at its own expense, construct over or under said track, hoppers, pits, or other loading or unloading devices, and when constructed they shall come under the provisions of this agreement, and all the terms and conditions hereof applying to the track shall apply with equal force to said hoppers, pits, or other loading or unloading devices except pipe lines which shall be covered by separate agreement.

565 (Sheet 4 of 12 sheets.)

(c) The Industry shall submit to the Railroad Company detail plans of any hoppers, pits, or other loading or unloading devices, and the construction thereof shall not be commenced until said plans have been approved by the Railroad Company.

* * * * *

The provisions relating to the ownership and maintenance of said track are found in the agreement between The New York Central Railroad Company as first party and The Cleveland Union Stock Yards Company as second party, to which agreement reference is hereby made.

Second. No casinghead gasoline shall be handled on said track without special permission. Other volatile liquids may be handled, provided the Industry complies with the regulations contained in ARA Circulars Nos. 2084–B and ES–3, or any regulations amendatory thereof or supplemental thereto, or provides,

566 (Sheet 5 of 12 sheets.)

at its own expense, such safeguards and protective devices as may be necessary to prevent the occurrence of any loss, damage or injury by reason of the inflammable or combustible nature of the substances handled. The Railroad Company will, if it finds the same necessary, install and maintain, at its own expense, insulated rail joints separating said track from all connecting tracks.

Third. In the event that the Railroad Company shall furnish material or labor herein undertaken to be furnished by the Industry, the Industry shall and will pay to the Railroad Company, promptly upon rendition of bills, the entire cost thereof, including unemployment, retirement, and other pay roll taxes, and the Railroad Company's current percentage charge to cover the expense of superintendence, supervision, and use of tools, handling and storing of material, workmen's compensation liability insurance, and accounting. Material and labor so furnished shall remain the property of the Railroad Company until such payment is made, and if such payment shall be in default beyond the period of thirty (30) days after bill is rendered, the Railroad Company, in addition to all other remedies, may discontinue all operations over and remove said tracks. The Railroad Company may, at its option, before furnishing such material or labor, require the Industry to advance to the Railroad Company the estimated cost thereof, which advance shall be adjusted to actual cost upon completion of the work.

567 (Sheet 6 of 12 sheets.)

Fourth. The Industry shall keep said track clear of obstructions, and shall not place or allow any temporary or permanent structures or obstructions of any kind within the space of eight and one-half feet on either side of the center line of said track, or within the space of twenty-one feet above the said track (being the standard clearance for structures of the Railroad Company), except as to the clearances, if any, less than standard shown upon said blueprint; provided, however, That no wire or cable line of any kind shall be placed or allowed within such further space on either side or above the said track as shall be determined by the Railroad Company in each particular case.

All clearances less than standard shown on said blueprint shall be protected by standard warning guards or signs placed in a manner and located satisfactorily to the duly authorized representative of the Railroad Company. The expense of installing and maintaining such guards or signs shall be borne by the Industry. If the structures or obstructions at said points are changed or removed, the clearance at said points shall then be made not less than standard.

The Industry shall assume and indemnify and hold harmless the Railroad Company for and from any and all liability, loss and expense (including Workmen's Compensation), resulting

568 (Sheet 7 of 12 sheets.)

from loss of life or damage or injury to persons or property (including employees of either of the parties hereto, arising in whole or in part by reason of or in any way resulting from the presence or maintenance of structures or obstructions encroaching upon the aforesaid standard clearances or from the presence of wire or cable lines over or adjacent to said track other than structures or obstructions, wire or cable lines belonging to the Railroad Company or its licensees.

Fifth. The Railroad Company may use the part of said track on its premises and may connect such part with other tracks, and after obtaining the specific written consent of the Industry, may use the part of said track on the premises of the Industry and may connect the same with other tracks, for the operation of its railroad or the use of third parties, provided such use or connection shall not interfere unreasonably with the use of the track, which is the subject of this agreement, for the business of the Industry. In the event of such use or connection to serve other patrons of the Railroad Company, or as a connection with other tracks owned or used by the Railroad Company, there shall be a reduction in the Industry's expense of maintenance and an adjustment of its original outlay, as to the part of said track so used, to be determined by the character and extent of such use.

569 (Sheet 8 of 12 sheets.)

The Industry agrees not to extend such part of said track as may be on premises owned, controlled, or occupied by the Industry or to connect it with any other track, or permit the use thereof by anyone not a party hereto without first obtaining the written consent of the Railroad Company. In the event of the use thereof by anyone not a party hereto, with such written consent but without entering into a written agreement with the Railroad Company, the Industry shall be responsible for the entire maintenance of such extensions thereto or connection therewith, and shall indemnify the Railroad Company against all liability for loss of life or damage or injury to persons or property by reason of or resulting from such use by others as if the Industry were the sole user.

Sixth. The Industry assumes all responsibility for and shall indemnify and hold harmless the Railroad Company from and against loss or damage to property of the Industry or to property upon the premises of the Industry or upon said track regardless of the Railroad Company's negligence, arising from fire caused

by locomotives operated by the Railroad Company for the purpose of serving said Industry, except to the premises of the Railroad Company and the rolling stock belonging to the Railroad Company or to third parties and to shipments then in the common carrier custody of the Railroad Company.

570 (Sheet 9 of 12 sheets.)

In respect of all loss or damage to property, other than by fire caused as aforesaid, or in respect of injury to or death of persons caused by or in connection with the construction, operation, maintenance, use, presence of removal of said track (a) the Railroad Company shall assume responsibility for and hold the Industry harmless from all losses, damages, claims, and judgments arising from or growing out of the sole actionable acts or omissions of the Railroad Company, its agents, or employees; (b) the parties hereto shall equally bear all losses, damages, claims, and judgments arising from or growing out of the joint or concurring actionable acts or omissions of both parties hereto, their respective agents or employees; and (c) the Industry shall assume the responsibility for and save the Railroad Company harmless from all losses, damages, claims, and judgments arising from or growing out of the sole actionable acts or omissions of the Industry, its agents, or employees.

Seventh. If at any time or times hereafter the Railroad Company makes any changes in the location or elevation of its line of railroad at the point of connection with said track, the Industry shall, at its own expense, make such changes in the portion of the track to be constructed and maintained by it as may be necessary to accommodate the changes to be made by the Railroad Company.

571 (Sheet 10 of 12 sheets.)

If the Railroad Company shall, at any time, equip its railroad for operation by electricity, the Railroad Company may install and maintain third rail or overhead trolley and other appurtenances for electrified operation on said track, and the Industry shall reimburse the Railroad Company for the cost of such installation and maintenance beyond the clearance point.

Eighth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect, except that whatever liability may have accrued to either party as against the other prior to the date of termination hereof, shall continue to remain in force. Such notice on the part of the Railroad Company may be given, at its option, by posting it upon or near said track, and this agreement in such case shall terminate thirty (30) days after such posting. Within thirty days after the termination as aforesaid of this agreement either party may remove from the

premises of the other all property belonging to it under this agreement, and all property not so removed from the premises of the other within that time shall belong to the party upon whose premises the property remains.

Ninth. The provisions hereof shall apply to and govern all changes in grade or location which may be made in said track and all extensions or additions thereto.

572 (Sheet 11 of 12 sheets.)

Tenth. This agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors, and assigns of the parties hereto, except that the Industry shall not assign this contract or any rights hereunder without first obtaining the written consent of the Railroad Company.

In witness whereof, the parties hereto have duly executed this agreement in triplicate the day and year first above written.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By F. S. RISLEY, [LS]
Asst. Vice Pres. & Genl. Mgr.

THE STANDARD BEEF COMPANY,

By STANDARD BEEF CO.
E. FRESSON [LS], *Sec.*

Form, approved W. W. King.
Description, approved R. O. Rote.

Terms and Conditions, Approved, H. W. F., G. H. J.

The Cleveland Union Stock Yards Company hereby consents to the use of that part of said track lettered BCDEF colored yellow on said plan by the Railroad Company for the purpose of serving The Standard Beef Company. Such use shall, as between the Railroad Company and The Cleveland Union Stock Yards Company, be without charge against the Railroad Company save and except the cost of maintaining such track but in all other respects such use shall be without prejudice to the rights of The Cleveland Union Stock Yards Company, the Railroad Company, or The Standard Beef Company under any and all previous

573 — (Sheet 12 of 12 sheets.)

agreements, contracts, or other legal documents between The New York Central Railroad Company or its predecessor in interest or between The Cleveland Union Stock Yards Company and The Standard Beef Company or their predecessor in title, all such rights being expressly reserved by the parties hereto. The Cleveland Union Stock Yards Company reserves the right to can-

cel this consent upon not less than thirty (30) days' notice in writing.

THE CLEVELAND UNION STOCK YARDS COMPANY,
By A. Z. BAKER [LS], *Pres.*

574 *Exhibit No. 16*

This Exhibit contains Private Side Track Agreement between The C. C. C. & Saint L. Ry. Co., Kellen Kreinberg and William A. Krasny, d. b. a. Kreinberg and Krasny, and the Cleveland Union Stock Yards Company:

Assignment of Agreement, dated July 7th, 1943, from Kellen Kreinberg and William A. Krasny, copartners d. b. a. Kreinberg and Krasny, to Kreinberg and Krasny, Inc.; and

Application and Consent, dated July 7th, 1943, of Kreinberg and Krasny, Inc., for permission to allow use of said track by United States Coast Guard, Commissary Supply Depot, and consent of The New York Central Railroad Company to such use of track.

575 (Sheet 2 of 14 sheets.)

PRIVATE SIDE TRACK AGREEMENT

This Agreement, made and executed in triplicate this first (1st) day of August 1927, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, Kellen Kreinberg and William A. Krasny, composing a partnership and doing business under the name of Kreinberg and Krasny, as Second Party, said First Party being hereinafter called the "Railroad," and said Second Party being hereinafter called the "Industry," and the Cleveland Union Stock Yards Company, a corporation, as Third Party, witnesseth:

Whereas, the Industry desires and has requested the Railroad to construct a track extension to an existing track known as Valuation No. 254, at Cleveland, Cuyahoga County, Ohio; most of which said track No. 254, together with the track connecting therewith extending to and connecting with the Railroad's main track connection, is owned by said Third Party, and

Whereas, said Railroad and said Third Party, insofar as their respective interests are concerned, are agreeable to the construction, of said track extension for said Industry and, in connection therewith, to the necessary incidental use of other tracks extending from the Railroad's main track connection to the location of the proposed extension.

576 (Sheet 3 of 14 sheets.)

Now, therefore, it is mutually covenanted and agreed:

First. (a) Said track extension as shown in yellow colors on the blueprint hereto attached, dated July 1st, 1927, and made a

part of this agreement, shall be constructed, owned, and maintained and the cost of such construction and maintenance shall be borne as hereinafter provided.

(b) It is understood and agreed that the term "cost" as used herein in respect of labor, material, and supervision of labor, or either, shall be inclusive of the expense of superintendence, supervision, and use of tools, handling and storing of material, workman's compensation and liability insurance, and accounting.

(c) In case any payment to be made by the Industry, as hereinafter provided, shall be in default beyond the period of thirty days after bill rendered therefor, the Railroad, in additional to all other remedies, may discontinue all operations over and remove said track.

Second. It is understood and agreed that the Industry shall:

(a) Without expense to the Railroad, obtain all licenses, franchises, and privileges, if any be necessary, for the construction, maintenance, and operation of the track extension in, upon or across any public alley, road, or street, or other public and/or private property and/or reservation which may be traversed or intersected thereby, and the necessary right of way for the portion of the track extension extending beyond the Railroad right-of-way; and the Industry shall assume all and singular the obligations imposed in or by any such license, franchise and/or

577 (Sheet 4 of 14 sheets.)

privilege and shall indemnify and save harmless the Railroad from any and all of said obligations and from any expense in connection therewith or incident thereto, and also from any and all of said obligations and from any expense in connection therewith or incident thereto, and also from any and all obligations hereafter imposed by public officers, or by law, or otherwise, and any expense in connection therewith or incident thereto, including policing and crossing protection for that portion of said track extension in, upon, or across such public highway or other property which may be traversed or intersected thereby.

(b) Pay to the Railroad, before the commencement of work by the Railroad, the estimated cost of all labor and material provided for in Clause (a) of Article Third hereof, it being understood that, upon completion of the work, the difference between the actual cost and the estimated cost shall be paid by the Industry to the Railroad, or returned by the Railroad to the Industry as the case may be.

(c) Without expense to the Railroad, construct the roadway, necessary waterways, waterway structures, and supports for said track extension.

(d) Without expense to the Railroad maintain said track extension proposed to be about 120 feet in length, and all its appur-

tenances, inclusive of bumping post, bridges, trestles, and waterways, if any, therefor, and shall own the material contained therein, said portion of track being indicated by a yellow line upon said blueprint.

(c) Upon written notice from, and without expense to, the

578 (Sheet 5 of 14 sheets.)

Railroad, repair or renew Industry's said track extension—inclusive of bumping post—bridges, trestles, and waterways, if any, therefor, or any of them, within the time specified in said notice and in a manner which shall be satisfactory to the Railroad.

Third. The Railroad shall perform the following:

(a) At the expense of the Industry, furnish (1) the material for the superstructure of said track extension, the ballast therefor, and the labor of laying and placing all of same, said track extension to be about 120 feet in length and to be located about as indicated by a yellow line upon said blueprint, and (2) the material for and labor of placing a bumping post at the end of said track extension.

Fourth. In the event that the Railroad shall furnish material or labor herein undertaken to be furnish by the Industry, the Industry shall and will pay to the Railroad, promptly upon rendition of bills, the entire cost thereof.

Fifth. The Industry shall, on the part of themselves and their officers, agents, and employes, keep said track extension clear of obstructions and shall not place or allow any temporary or permanent structure or other obstruction of any kind to be

579 (Sheet 6 of 14 sheets.)

placed by their officers, agents, or employees, within the space of twenty-two (22) feet above the said track extension or within eight and one-half (8½) feet on either side of the center line of said track extension.

Sixth. The Railroad may at any time disconnect and/or refuse to place cars upon the portion of the track extension, or any portion thereof herein provided to be maintained by the Industry, if, in the judgment of the Railroad, same is in an unsafe condition, without being in any manner liable to the Industry.

Seventh. The Railroad shall have the right to cease, forthwith and without notice, all operations upon said track extension, if compelled so to do by the owners, other than the respective parties hereto, of the land upon which said track extension, or any portion thereof, may be laid.

Eighth. Except only as the parties hereto shall in writing stipulate otherwise, all provisions herein as to the aforementioned track extension shall apply to any and all additions thereto and/or

extensions thereof, and maps or prints, approved by the parties hereto, showing such additions and/or extensions may, at the option of the Railroad, be by it annexed hereto or to its original hereof and shall thereby become a part of this agreement.

* * * * *

580 (Sheet 7 of 14 sheets.)

The Industry agrees not to extend such part of said track extension as may be on the premises owned, controlled, or occupied by the Industry, or to connect the same with any other track, or permit the use thereof by any one not a party hereto without first obtaining the written consent of the Railroad.

Tenth. It is understood that the movement of locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad against loss of or damage to property of the Industry or to property upon its premises, regardless of the Railroad's negligence arising from fire caused by locomotives operated by the Railroad on said track extension, or in the vicinity thereof, for the purpose of serving said Industry, except to the premises of the Railroad and to rolling stock belonging to the Railroad or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless

581 (Sheet 8 of 14 sheets.)

the Railroad for loss, damage, or injury from any act or omission of the Industry, its employes or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person, firm, or corporation, and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be equally borne by them.

The term "Railroad" under this Article shall include the Tenants and Licensees of said First Party.

Eleventh. This agreement shall terminate thirty (30) days after written notice by (any) party hereto to the other parties to that effect; such notice, on the part of the Railroad, may, at its option, be given by posting it upon a conspicuous part of the premises; after which period (either) party may remove all property belonging to it under this agreement, except as herein otherwise provided.

Until terminated as above provided, this agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors, and assigns of the parties hereto; Provided, however, That, as to the Industry, no assignment of this

agreement shall be valid without the written consent of the Railroad.

* * * * *

582 (Sheet 9 of 14 sheets.)

Twelfth. It is understood and agreed that this contract shall apply to all portions of the track extension shown in colors on the blueprints attached as hereinbefore provided, which may have been constructed under this or any other agreement or otherwise prior to the making of this contract, which portions shall be and become subject to all of its terms applicable subsequent to construction, as fully as though originally constructed, maintained and operated hereunder.

Thirteenth. Said Third Party hereby consents to this agreement and executes the same indicative of its approval there-

583 (Sheet 10 of 14 sheets.)

of.

In witness whereof, the parties hereto have duly executed this agreement in triplicate the day and year first above written.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,
By (Sgd.) C. S. MILLARD, *General Manager.*
KREINBERG AND KRASNY,
By (Sgd.) K. KREINBERG.
And (Sgd.) WM A. KRASNY.
THE CLEVELAND UNION STOCK YARDS COMPANY,
By (Sgd.) C. Z. BAKER (?), *President.*

Approved:
(Sgd.) E. N. QUIGLEY,
General Counsel.
(Sgd. HADLEY BALDWIN,
Chief Engineer.

Witnesses:
(Sgd.) W. L. FEARATE.
(Sgd.) F. VAN HORN.

Application approved by: JEE–JDB–JEA–JAEMHS.

584 (Sheet 11 of 14 sheets.)

APPLICATION AND CONSENT

CLEVELAND, OHIO, *July 7th, 1913.*

Kreinberg and Krasny, Inc., successor to Kallen Kreinberg and William A. Krasny, copartners doing business as Kreinberg and Krasny, Second Party to an agreement dated August 1st, 1927 with The C. C. C. & St. L. Ry. Co., predecessor to The New York Central Railroad Company, Lessee covering a side

track at Cleveland, Ohio located as shown on plan dated July 1st, 1927, which said plan is attached to the aforesaid agreement and made a part thereof, hereby makes application for permission to allow the use of said track by United States Coast Guard, Commissary Supply Depot.

In consideration of the granting of this application, the undersigned agrees that for the purpose of fixing liability, the premises, property, agents, and employes of said United States Coast Guard, Commissary Supply Depot shall be regarded as that of the undersigned, which hereby assumes all liability for loss, damages, or injuries to persons or property resulting from the use of said track arising while either it or the said United States Coast Guard, Commissary Supply Depot is being served, to the same extent as liability is now assumed by the undersigned in the aforesaid agreement.

This permission shall be subject to termination at any time by either party hereto giving to the other not less than ten (10) days written notice, whereupon at the time named in said notice, or upon the termination of the aforesaid agreement, this permis-

585 (Sheet 12 of 14 sheets.)

sion shall fully cease and determine.

KREINBERG AND KRASNY, INC.,
By (Sgd.) JEROME KREINBERG, *Secretary.*

The New York Central Railroad Company, lessee of The C. C. C. & St. L. Ry. Co., hereby grants the foregoing application and consents to the use of said track by United States Coast Guard, Commissary Supply Depot upon the terms and conditions on said application set forth.

THE NEW YORK CENTRAL
RAILROAD COMPANY,
Lessee of The C. C. C. & St. L. Ry. Co.,
By (Sgd.) F. F. RIEPEL,
Asst. Vice Pres. & Gen. Mgr.

The Cleveland Union Stock Yards Company, third party to the aforesaid agreement, hereby consents to the use of said track by United States Coast Guard, Commissary Supply Depot.

THE CLEVELAND UNION STOCK YARDS COMPANY,
By (Sgd.) A. Z. BAKER, *President.*

New York Central.
Form Approved.
(Sgd.) W. N. KING, ocp.
Description Approved———.
Terms and Conditions Approved———.

586 (Sheet 12 of 14 sheets.)

ASSIGNMENT OF AGREEMENT

CLEVELAND, OHIO, *July 7th, 1945.*

For a valuable consideration received to their full satisfaction, Kallem Kreinberg and William A. Krasny, copartners doing business as Kreinberg and Krasny, hereby sell, assign, transfer, and convey to Kreinberg and Krasny, Inc., all their right, title to, and interest in the certain agreement dated August 1st, 1927, between the C. C. C. & St. L. Ry. Co., predecessor to The New York Central Railroad Company Lessee as First Party, Kallem Kreinberg and William A. Krasny, d. b. a. Kreinberg and Krasny, as Second Party, and The Cleveland Union Stock Yards Company as Third Party, relating to a side track at Cleveland, Ohio, located as shown on Plan dated July 1st, 1927, which said plan is attached to the aforesaid agreement and made a part thereof.

KALLEM KREINBERG,
per JEROME KREINBERG
(Sgd.) WM. A. KRASNY,
Copartners doing business as
Kreinberg and Krasny.

Kreinberg and Krasny, Inc., hereby accepts the foregoing assignment, and in consideration of the consent of the Railroad hereon and read hereby agrees to be bound by all and singular of the terms, conditions, provisions, limitations, and agreements, including the provisions relating to the liability of the parties, that are contained in the aforesaid agree-

587 (Sheet 13 of 14 sheets.)

ment.

KREINBERG AND KRASNY, INC.,
By (Sgd.) JEROME KREINBERG, *Sec.*

The New York Central Railroad Company, lessee of The C. C. C. & St. L. Ry. Co., hereby consents to and approves the foregoing assignment and acceptance thereof.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of The C. C. C. & St. L. Ry. Co.,
By (Sgd.) F. F. RIEPEL,
Asst. Vice Pres. & Gen. Mgr.

New York Central Form Approved
(Sgd.) W. N. KING, *Rep.*
EJG.
Description Approved ———.
Terms and Conditions Approved ———.

588 *Exhibit No. 17*

(Sheet 1 of 21 sheets.)

This Exhibit contains:

(a) Sidetrack Agreement dated October 1st, 1937, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, Earl C. Gibbs, Inc., and The Cleveland Union Stock Yards Company.

(b) Application and Consent dated March 16th, 1939, permitting use of sidetrack by Hansel Packing Company consented to by The Cleveland Union Stock Yards Company.

(c) Application and Consent dated November 4th, 1939, permitting use of sidetrack by Hygrade Food Products Corporation.

(d) Mutual Consent Form dated May 7th, 1940, terminating the Application and Consent dated March 16th, 1939, wherein the Hansel Packing Company was permitted to use said track.

(e) Application and Consent dated September 10th, 1942, permitting use of sidetrack by Cleveland Provision Company.

589 (Sheet 2 or 21 sheets.)

PRIVATE SIDETRACK AGREEMENT

This agreement made this 1st day of October 1937, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway (hereinafter called the Railroad Company), party of the first part, and Earl C. Gibbs, Inc., of the City of Cleveland, County of Cuyahoga, State of Ohio (hereinafter called the Industry), party of the second part, and The Cleveland Union Stock Yards Company, party of the third part, witnesseth:

Whereas, the Industry has applied to the Railroad Company for a sidetrack connection with the Railroad Company's line of railroad in the City of Cleveland, County of Cuyahoga, and State of Ohio.

Now therefore, in consideration of the covenants and agreements herein contained, and the mutual benefits to be derived thereunder, the parties hereto agree that the said sidetrack (shall be) (has been) constructed and shall be maintained subject to the following terms and conditions:

First. The term "track" as used herein includes all track, roadbed, bridges, and other supporting structures or appurtenances used directly in connection therewith, shown in red, green, and yellow colors on blue print No. C-6959-K3, dated September 23, 1937 hereto attached and made a part of this agreement. The

590 (Sheet 3 of 21 sheets.)

track (shall be) (has been) constructed and the same shall be owned and maintained by the parties hereto as follows:

(a) The Industry shall, without cost to the Railroad Company, provide the necessary right of way for the portion of the track extending beyond the Railroad Company's premises, and procure and maintain in effect all grants, licenses, franchises, or permits necessary for the construction, maintenance, and operation of the track, in, upon, or across any public road, street, or other property or reservation which may be traversed or intersected thereby, and assume the obligations imposed in or by reason of such grants, licenses, franchises, or permits, or hereafter imposed by law or other public authority in respect thereof including all taxes, assessments and license fees, policing and the erection, maintenance, and operation of any crossing gates or other warnings or protection, and indemnify and hold harmless the Railroad Company from any and all cost and expense in connection therewith.

* * * * *

591 (Sheet 4 of 21 sheets.)

(d) The Industry may, at its own expense, construct over or under said track, hoppers, pits, or other loading or unloading devices, and when constructed they shall come under the provisions of this agreement, and all the terms and conditions thereof applying to the track shall apply with equal force to said hoppers, pits, or other loading or unloading devices except pipe lines which are covered by separate agreement.

(e) The Industry shall submit to the Railroad Company detail plans of hoppers, pits, or other loading or unloading devices, and the construction thereof shall not be commenced until said plans have been approved by the Railroad Company.

(f) The Industry shall, at its own expense, keep that part of the said track beyond the clearance point clear of ice, snow, and refuse for a distance of eight and one-half feet on both sides of the center line of said track.

(g) If the Industry fails to maintain in safe condition, in the judgment of the Railroad Company, the part of the track which it is required to maintain, the Railroad Company may discontinue the track or refuse to operate over the same when

592 (Sheet 5 of 21 sheets.)

not in such condition.

That part of said track lettered AB and DE colored red on said plan shall be maintained by the Railroad Company at its sole cost and expense. The ownership of said track AB and DE shall vest in the Railroad Company.

That part of said track lettered EF colored yellow on said plan shall be maintained by the Railroad Company and the Railroad Company shall bill against the Industry for the entire expense thereof, which said bills the Industry hereby agrees to pay upon presentation.

That part of said track lettered FGHJ, GK, and HL colored yellow on said plan, including a car stop at point K and a patent bumper at point L as shown on said plan, shall be maintained by the Industry at its sole cost and expense and to the entire satisfaction of the Chief Engineer of the Railroad Company or his duly authorized representative, but the Railroad Company hereby expressly disclaims any obligation to inspect said track FGHJ, GK, and HL, or said car stop and patent bumper. The ownership of the track lettered EF, FGHJ, GK, and HL, including said car stop and patent bumper, shall vest in the Industry.

Any special safety appliances, ticklers, or warning signs ordered installed by The Public Utilities Commission of Ohio because of scant clearances shall be installed by the Industry at its sole cost and expense.

593 (Sheet 6 of 21 sheets.)

The gates in the location as shown on said plain shall be maintained by the Industry at its sole cost and expense.

The Industry shall open and close said gates at all times whenever the Railroad Company has occasion to operate over said track.

Second. No casinghead gasoline shall be handled on said track without special permission. Other volatile liquids may be handled, provided the Industry complies with the regulations contained in AKA Circulars Nos. 2084–B and ES–3, or any regulations amendatory thereof or supplemental thereto, or provides, at its own expense, such safeguards and protective devices as may be necessary to prevent the occurrence of any loss, damage, or injury by reason of the inflammable or combustible nature of the substance handled. The Railroad Company will, if it finds the same necessary, install and maintain, at its own expense, insulated rail joints separating said track from all connecting tracks.

Third. In the event that the Railroad Company shall furnish material or labor herein undertaken to be furnished by the Industry, the Industry shall and will pay to the Railroad Company, promptly upon rendition of bills, the entire cost thereof, including unemployment, retirement, and other pay roll taxes, and the Railroad Company's current percentage charge to cover the expense of superintendences, supervision, and use of tools, handling and storing of material, workmen's

594 (Sheet 7 of 21 sheets.)

compensation liability insurance, and acounting. Material

and labor so furnished shall remain the property of the Railroad Company until such payment is made, and if such payment shall be in default beyond the period of thirty (30) days after bill is rendered, the Railroad Company, in addition to all other remedies, may discontinue all operations over and remove said tracks. The Railroad Company may, at its option, before furnishing such material or labor, require the Industry to advance to the Railroad Company the estimated cost thereof, which advance shall be adjusted to actual cost upon completion of the work.

Fourth. The Industry shall keep said track clear of obstructions, and shall not place or allow any temporary or permanent structures or obstructions of any kind within the space of eight and one-half feet on either side of the center line of said track, or within the space of twenty-one feet above the said track (being the standard clearance for structures of the Railroad Company), except as to the clearances, if any, less than standard shown upon said blueprint; Provided, however, That no wire or cable line of any kind shall be placed or allowed within such further space on either side or above the said track as shall be determined by the Railroad Company in each particular case.

595 (Sheet 8 of 21 sheets.)

All clearances less than standard shown on said blueprint shall be protected by standard warning guards or signs placed in a manner and located satisfactorily to the duly authorized representative of the Railroad Company. The expense of installing and maintaining such guards or signs shall be borne by the Industry. If the structures or obstructions at said points are changed or removed, the clearance at said points shall then be made not less than standard.

The Industry shall assume and indemnify and hold harmless the Railroad Company for and from any and all liability, loss and expense (including Workmen's Compensation), resulting from loss of life or damage or injury to persons or property (including employees of either of the parties hereto), arising in whole or in part by reason of or in any way resulting from the presence or maintenance of structures or obstructions encroaching upon the aforesaid standard clearances or from the presence of wire or cable lines over or adjacent to said track other than structures or obstructions, wire or cable lines belonging to the Railroad Company or its licensees.

Fifth. The Railroad Company may use the part of said track on its premises and may connect such part with other tracks, and after obtaining the specific written consent of the Industry, may use the part of said track on the premises

596 (Sheet 9 of 21 sheets.)

of the Industry and may connect the same with other tracks,

for the operation of its railroad or the use of third parties, provided such use or connection shall not interfere unreasonably with the use of the track, which is the subject of this agreement, for the business of the Industry. In the event of such use or connection to serve other patrons of the Railroad Company, or as a connection with other tracks owned or used by the Railroad Company, there shall be a reduction in the Industry's expense of maintenance and an adjustment of its original outlay, as to the part of said track so used, to be determined by the character and extent of such use.

The Industry agrees not to extend such part of said track as may be on premises owned, controlled, or occupied by the Industry or to connect it with any other track, or permit the use thereof by anyone not a party hereto without first obtaining the written consent of the Railroad Company. In the event of the use thereof by anyone not a party hereto, with such written consent but without entering into a written agreement with the Railroad Company, the Industry shall be responsible for the entire maintenance of such extensions thereto or connection therewith, and shall indemnify the Railroad Company against all liability for loss of life or damage or injury to persons or property by reason of or resulting from such use by others as if the Industry were the sole user.

597 (Sheet 10 of 21 sheets.)

SIXTH. The Industry assumes all responsibility for and shall indemnify and hold harmless the Railroad Company from and against loss or damage to property of the Industry or to property upon the premises of the Industry or upon said track regardless of the Railroad Company's negligence, arising from fire caused by locomotives operated by the Railroad Company for the purpose of serving said Industry, except to the premises of the Railroad Company and the rolling stock belonging to the Railroad Company or to third parties and to shipments then in the common carrier custody of the Railroad Company.

In respect of all loss or damage to property, other than by fire caused as aforesaid, or in respect of injury to or death of persons caused by or in connection with the construction, operation, maintenance, use, presence, or removal of said track (a) the Railroad Company shall assume responsibility for and hold the Industry harmless from all losses, damages, claims, and judgments arising from or growing out of the sole actionable acts or omissions of the Railroad Company, its agents or employees; (b) the parties hereto shall equally bear all losses, damages, claims, and judgments arising from or growing out of the joint or concurring actionable acts or omissions of both parties hereto, their respective agents or em-

ployees; and (c) the Industry shall assume the responsibility for and save the Railroad Company harmless from all losses, damages, claims, and judgments arising from or growing out of the sole actionable acts or omissions of the Industry, its agents or employees.

598 (Sheet 11 of 21 sheets.)

SEVENTH. If at any time or times hereafter the Railroad Company makes any changes in the location or elevation of its line of railroad at the point of connection with said track, the Industry shall, at its own expense, make such changes in the portion of the track to be constructed and maintained by it as may be necessry to accommodate the changes to be made by the Railroad Company.

If the Railroad Company shall, at any time, equip its railroad for operation by electricity, the Railroad Company may install and maintain third rail or overhead trolley and other appurtenances for electrified operation on said track, and the Industry shall reimburse the Railroad Company for the cost of such installation and maintenance beyond the clearance point.

EIGHTH. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect, except that whatever liability may have accrued to either party as against the other, prior to the date of termination hereof, shall continue to remain in force. Such notice on the part of the Railroad Company may be given, at its option, by posting it upon or near said track, and this agreement in such case shall terminate thirty (30) days after such posting. Within thirty days after the termination as aforesaid of this agreement either party may remove from the premises of the other all property belonging to it under this agreement and all property not so removed from the premises of the other

599 (Sheet 12 of 21 sheets.)

within that time shall belong to the party upon whose premises the property remains.

Ninth. The provisions hereof shall apply to and govern all changes in grade or location which may be made in said track and all extensions or additions thereto.

The agreement dated July 27th, 1933, between the Railroad Company as first party and The Cleveland Provision Company, predecessor to the Industry, as second party, relating to a part of said track, shall be and the same hereby is terminated. (36990).

Tenth. This agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors and assigns of the parties hereto, except that the Industry shall not assign this contract or any rights hereunder without first obtaining the written consent of the Railroad Company.

In witness whereof, the parties hereto have duly executed this agreement in triplicate the day and year first above written.

THE NEW YORK CENTRAL
RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati,
Chicago and St. Louis Railway.
By F. S. RISLEY [LS],
Asst. Vice Pres. & Genl. Manager.
EARL C. GIBBS, INC.,
By EARL C. GIBBS [LS], *Pres.*

Form Approved:
W. N. KING.
Description Approved:
R. O. ROTE.
Terms and Conditions Approved:
C. M. WILLIAMS.
H. W. F.

600 (Sheet 13 of 21 sheets.)

The Cleveland Union Stock Yards Company hereby consents to the use of that part of said track lettered BCD colored green on said plan by the Railroad Company for the purpose of serving Earl C. Gibbs, Inc. Such use shall, as between the Railroad Company and The Cleveland Union Stock Yards Company, be without charge against the Railroad Company save and except the cost of maintaining ~~such~~ track but in all other respects such use shall be without prejudice to the rights of The Cleveland Union Stock Yards Company, the Railroad Company, or Earl C. Gibbs, Inc., under any and all previous agreements, contracts, or other legal documents between The New York Central Railroad Company or its predecessor in interest or between the Cleveland Union Stock Yards Company and Earl C. Gibbs, Inc., or their predecessor in title, all such rights being expressly reserved by the parties hereto. The Cleveland Union Stock Yards Company reserves the right to cancel this consent upon not less than thirty (30) days' notice in writing.

THE CLEVELAND UNION STOCK
YARDS COMPANY,
By (Sgd.) A. Z. BAKER. [LS]
R. W.

601 (Sheet 14 of 21 sheets.)

APPLICATION AND CONSENT

CLEVELAND, OHIO, *March 16th, 1939.*

Earl C. Gibbs, Inc., Second Party to an agreement dated October 1st, 1937, with The New York Central Railroad Company, Lessee

of the C. C. C. & St. L. Ry., covering sidetracks at Cleveland, Ohio, located as shown on plan No. C-6959-K3 dated Sept. 23, 1937, which said plan is attached to the aforesaid agreement and made a part thereof, hereby makes application for permission to allow the use of said tracks by Hansol Packing Company.

In consideration of the granting of this application, the undersigned agrees that for the purpose of fixing liability, the premises, property, agents, and employes of said Hansol Packing Company shall be regarded as that of the undersigned, which hereby assumes all liability for loss, damages, or injuries to persons or property resulting from the use of said tracks arising while either it or the said Hansol Packing Company is being served, to the same extent as liability is now assumed by the undersigned in the aforesaid agreement.

This permission shall be subject to the termination at any time by either party hereto giving to the other not less than ten (10) days written notice, whereupon at the time named in said notice, or upon the termination of the

602 (Sheet 15 of 21 sheets.)

aforesaid agreement, this permission shall fully cease and determine.

EARL C. GIBBS, INC.,
By ELMER DIETRICH,
Secretary.

The New York Central Railroad Company, Lessee of the C. C. C. & St. L. Ry., hereby grants the foregoing application and consents to the use of said tracks by Hansol Packing Company upon the terms and conditions on said application set forth.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the C. C. C. & St. L. Ry.,
By A. E. LLOYD,
Assistant General Manager.

New York Central Form Approved.
W. N. KING.
Description Approved———.
Terms and Conditions Approved———.
C. H. J.

603 (Sheet 16 of 21 sheets.)

The Cleveland Union Stock Yards Company hereby consents to the use of sidetracks covered by the agreement between The New York Central Railroad Company, Earl C. Gibbs, Inc., and The Cleveland Union Stock Yards Company dated October 1st, 1937, by The New York Central Railroad Company, for the

purpose of serving the Hansol Packing Company and other tenants of Earl C. Gibbs, Inc., under the terms, conditions, and restrictions in respect to shipments to and from Earl C. Gibbs, Inc., contained in said agreement.

Dated March 16th, 1939.

THE CLEVELAND UNION STOCK YARDS CO.,
(Sgd.) A. Z. BAKER, *President.*

604 (Sheet 17 of 21 sheets.)

APPLICATION AND CONSENT

CLEVELAND, OHIO, *November 4th, 1939.*

Earl C. Gibbs, Inc., Second Party to an agreement dated October 1st, 1937, with The New York Central Railroad Company, Lessee of the C. C. C. & St. L. Ry., covering side tracks at Cleveland, Ohio, located as shown on plan No. C-6959-K3 dated Sept. 22, 1937, which said plan is attached to the aforesaid agreement and made a part thereof, hereby makes application for permission to allow the use of said track by Hygrade Food Products Corporation.

In consideration of the granting of this application, the undersigned agrees that for the purpose of fixing liability, the premises, property, agents, and employes of said Hygrade Food Products Corporation shall be regarded as that of the undersigned, which hereby assumes all liability for loss, damages, or injuries to persons or property resulting from the use of said track arising while either it or the said Hygrade Food Products Corporation is being served, to the same extent as liability is now assumed by the undersigned in the aforesaid agreement.

This permission shall be subject to termination at any time by either party hereto giving to the other not less than ten (10) days' written notice, whereupon at the time named in said notice, or upon the termination of the

605 (Sheet 18 of 21 sheets.)

aforesaid agreement, this permission shall fully cease and determine.

EARL C. GIBBS, INC.,
EARL C. GIBBS, *Vice Pres.*

The New York Central Railroad Company, Lessee of the C. C. C. & St. L. Ry. hereby grants the foregoing application and consents to the use of said track by Hygrade Food Products Corpo-

ration upon the terms and conditions on said application set forth.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the C. C. C. & St. L. Ry.,
By A. E. LLOYD.

New York Central Form Approved.
W. E. KING.
G. H. J..
W.

Description Approved ———.
Terms and Conditions Approved ———.

606 (Sheet 19 of 21 sheets.)

CLEVELAND, OHIO, *May 7th 1940.*

By mutual consent of the Parties, the application and consent dated March 16th, 1939, wherein the Hansol Packing Company is permitted to use certain side tracks at Cleveland, Ohio, which are the subject of an agreement dated October 1st, 1937, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, as first party, and Earl C. Gibbs, Inc., as second party, shall be and the same hereby is terminated.

In witness whereof, the parties hereto have executed this instrument in duplicate as of the day and year first above written.

THE NEW YORK CENTRAL RAILROAD COMPANY.
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company.
By A. E. LLOYD,
Assistant General Manager.
EARL C. GIBBS, INC.,
By EARL C. GIBBS, *Pres.*

Approved as to Form
W. N. KING, *General Attorney,*
New York Central R. R. Co.

607 (Sheet 20 of 21 sheets.)

APPLICATION AND CONSENT

CLEVELAND, O., *September 10, 1942.*

Earl C. Gibbs, Inc., Second Party to an agreement dated October 1st, 1937, with The New York Central Railroad Company, lessee of the C. C. C. & St. L. Ry. Co., covering side tracks at

Cleveland, Ohio, located as shown on plan No. C-6959-K3 dated Sept. 23rd, 1937, which said plan is attached to the aforesaid agreement and made a part thereof, hereby makes application for permission to allow the use of said tracks by Cleveland Provision Company.

In consideration of the granting of this application, the undersigned agrees that for the purpose of fixing liability, the premises, property, agents, and employes of said Cleveland Provision Company shall be regarded as that of the undersigned, which hereby assumes all liability for loss, damages, or injuries to persons or property resulting from the use of said tracks arising while either it or the said Cleveland Provision Company is being served, to the same extent as liability is now assumed by the undersigned in the aforesaid agreement.

This permission shall be subject to termination at any time by either party hereto giving to the other not less than ten (10) days written notice, whereupon at the time named in said notice, or upon the termination of the aforesaid

608 (Sheet 21 of 21 sheets.)

agreement, this permission shall fully cease and determine.

EARL C. GIBBS, INC.,
By (Sgd.) EARL C. GIBBS, *Vice Pres.*

The New York Central Railroad Company, lessee of the C. C. C. & St. L. Ry. Co., hereby grants the foregoing application and consents to the use of said tracks by Cleveland Provision Company upon the terms and conditions on said application set forth.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the C. C. C. & St. L. Ry. Co.,
By (Sgd.) A. E. LLOYD,
Assistant General Manager.

New York Central Form Approved
(Sgd.) W. N. KING.
Description Approved ———.
Terms and Conditions Approved ———.

C. H. J.

609 *Exhibit No. 18*

(Sheet 1 of 8 sheets.) (Registry No. 56313-A.)

Exhibit contains: Agreement dated November 25, 1916, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company and Swift and Company.

610 (Sheet 2 of 8 sheets.)

This Agreement, made as of the twenty-fifth (25th) day of November, in the year 1916, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, and Swift and Company, a corporation, as Second Party, witnesseth:

Whereas, the First Party owns a sidetrack at Cleveland, Cuyahoga County, Ohio, on First Party's Cleveland Division, as shown by solid red line upon blueprint hereto attached and made part hereof. Said sidetrack is connected with First Party's sidetrack on the west side thereof extending northwardly about four hundred and eighty-seven (487) feet of which about ninety-seven (97) feet are on land owned or controlled by the First Party, about one hundred and sixty (160) feet on land owned or controlled by the Blumenstock-Reid Company and about two hundred and thirty (230) feet on land owned or controlled by the Second Party. A portion of said sidetrack was constructed pursuant to agreements dated October 27th, 1910, and May 25th, 1912, between the First Party hereto and Henry C. Thom, doing business under the name of the Peoples Packing Company, a predecessor of the Second Party hereto, and

Whereas, the Second Party desires the construction of an eighty (80) foot extension on the north end of said sidetrack

611 (Sheet 3 of 8 sheets.)

upon the property of the Second Party, as shown by a solid yellow line on said blueprint, and

Whereas, the Second Party desires the construction of two sidetracks numbered one (1) and two (2), as shown by solid yellow lines on said blueprint. Said sidetrack number one (1) is to be connected with First Party's sidetrack on the southeast side thereof extending northeast and northwardly about seven hundred and seventy (770) feet of which about one hundred and four (104) feet shall be on the land owned or controlled by the First Party, about eighty-four (84) feet on the land of the Second Party west of West Sixty-third Street, about one hundred and seventy-eight (178) feet in and across West Sixty-third Street and about four hundred and four (404) feet on the land of the Second Party east of West Sixty-third Street; said sidetrack number two (2) is to be connected with said sidetrack number one (1) on the east side thereof extending northwardly about four hundred and four

(404) feet on the land of the Second Party east of West Sixty-third Street.

Now, therefore, in consideration of One Dollar ($1.00) the receipt of which is hereby acknowledged, and of benefits to the Second Party, it is agreed between the parties hereto as follows:

1. That the First Party will construct said sidetrack extension and said sidetracks as above indicated, upon the fol-

612 (Sheet 4 of 8 sheets.)

lowing terms and conditions:

(a) Before the commencement of work by the First Party the Second Party shall pay to the First Party the estimated cost of the material for the track extension superstructures and the labor of laying same and the estimated cost, on a pro rata per foot of track basis, of the material for the track superstructure and the labor of laying same for that portion of said tracks numbers one and two (1 and 2) to be located upon Second Party's property east of the east line of West Sixty-third Street and upon completion of the work the difference between the actual cost and the estimated cost, as herein provided, shall be paid by the Second Party to the First Party, or, returned by the First Party to the Second Party, as the case may be.

(b) The Second Party shall, at its own expense, construct the roadway, necessary waterways, and waterway structures for said track extension and for said tracks numbers one and two (1 and 2) including the material for and rearranging of the street paving, to the satisfaction and approval of the First Party.

(c) The First Party shall furnish the material for the superstructure of said tracks numbers one and two (1 and 2) and said track extension and the labor of laying all of same.

2. That said existing sidetrack, said extension and said tracks numbers one and two (1 and 2), shall be maintained by the First Party and the Second Party shall, upon presentation of

613 (Sheet 5 of 8 sheets.)

bill therefor, pay to the First Party the cost of maintaining said track extension and also that portion of said tracks numbers one and two (1 and 2) owned by the Second Party and located on its land east of the east line of West Sixty-third Street.

3. That the ownership and control of said existing sidetrack, as shown by solid red line on said blueprint, and the southwesterly three hundred and sixty-six (366) feet of said track number one (1) located on the land of the First Party, on land of the Second Party west of the east line of West Sixty-third Street and in and across West Sixty-third Street shall be vested solely in the First Party; that the ownership and control of said sidetrack extension and that portion of said sidetracks numbers one and two (1 and 2) located on the land of the Second Party east of the east line of

West Sixty-third Street shall be vested solely in the Second Party. The First Party shall have the right to use, without cost, the whole or any part of said sidings in connection with other business than that of the Second Party.

4. That the Second Party, without the written consent of the First Party, will not direct or authorize the use of said tracks or extension by or for the benefit of any other party not one of the parties hereto. In the event of the Second Party sells or leases its said track extension or that portion of said sidetracks numbers one and two (1 and 2) located on its land east of the east line of West Sixty-third Street, or sells or leases the

614 (Sheet 6 of 8 sheets.)

premises served by any of said sidetracks or extension, the grantee or lessee shall acquire no interest in the tracks of the First Party, or right to service upon any of said tracks or extension until he shall have contracted in writing with the First Party for such interest or such service.

5. That it shall be the duty of the Second Party, in moving any car placed upon said tracks or extension to avoid fouling or obstructing the main or other tracks of the First Party. It shall also be the duty of the Second Party to keep said tracks and extension free from any obstructions which may endanger First Party's employes in discharging their duties as trainmen. It shall also be the duty of the Second Party, when First Party is moving any car or cars upon said tracks or extension to keep its employes and persons upon the premises having business with it, from occupying or being upon or near any car on said tracks or extension. For the failure to perform any such duty, said Second Party does hereby assume liability and indemnifies and saves harmless the First Party. The Second Party does also assume all liability for obstructions of any street, highway or alley by said tracks or from the uses thereof.

6. That the First Party, its successors and assigns, shall have the right at any time after sixty (60) days' notice in writing to the Second Party to discontinue use of said tracks and extension and remove all of the same belonging to the First

615 (Sheet 7 of 8 sheets.)

Party, and to enter upon the property of the Second Party for the purpose of removing so much of said sidetracks belonging to the First Party as may be located thereon, the First Party in such case to commit no unnecessary injury to the property of the Second Party.

7. That the Second Party reserves the right to have removed at any time upon sixty (60) days' notice in writing to the First Party, so much of said tracks and extension located on land of said Second

Party, the ownership of which is vested in said First Party or said Second Party.

8. The Second Party hereby indemnifies and agrees to save harmless the First Party from any loss, damage, or injury by fire originating in or from the use of said tracks and extension or any connecting track and affecting the property or person of anyone upon the premises served by said tracks and extension. Also from any loss, damage, or injury by fire originating upon the premises served by said tracks and extension from any negligence of the Second Party, and communicated directly or indirectly to property or persons upon other premises.

9. The Second Party shall, at its own expense, secure from the proper officers of Cleveland, Ohio, authority for the construction, maintenance operation over and removal of that portion of track number one (1) in and across West Sixty-third Street.

10. This agreement shall supersede the said agreement
616 (Sheet 8 of 8 sheets.)
of October 27th, 1910, and May 25th, 1912.

In testimony whereof the parties hereto have caused this agreement to be executed in duplicate the day and year first above written.

THE CLEVELAND CINCINNATI CHICAGO AND SAINT LOUIS RAILWAY COMPANY.
By (Sgd.) H. A. WORCESTER.
Vice President & General Manager.

Witnesses:
(Sgd.) W. H. GIBSON.
(Sgd.) RUTH H. MILLER.

Approved:
(Sgd.) C. A. PAQUETTE.
Chief Engineer.
(Sgd.) L. J. H.

[SEAL]

SWIFT AND COMPANY,
By (Sgd.) LOUIS F. SWIFT,
President.

Attest:
(Sgd.) C. A. PEACOCK, *Assistant Secretary*

O K (Sgd.) M. C. M.
(Sgd.) R. C. M.
(Sgd.) H. W. T.
(Sgd.) G. L. H.
(Sgd.) H. C. B.
(Sgd.) ——— ———.

618 *Exhibit No. 19*

(Sheet 1 of 4 sheets. Registry No. 2778.)

This agreement, Made as of the twenty-seventh day of October in the year 1910, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation existing under and by virtue of the laws of the States of Ohio and Indiana, as First Party and Henry C. Thom, doing business under the firm name of the Peoples Packing Company of Cleveland, Ohio, as Second Party, witnesseth:

Whereas, the Second Party desires the construction of a sidetrack at West 63rd Street (Prim Street) Cleveland, Cuyahoga County, Ohio, on the Cleveland Division of The Cleveland, Cincinnati, Chicago & Saint Louis Railway Company, as shown on the blueprint hereto attached, which is made a part of this agreement.

Said sidetrack to be connected with the Prim Street siding of the Division aforesaid, on the west side thereof extending northwardly about two hundred fifty-eight (258) feet of which about eighty-six (86) feet shall be on the land of First Party, and about one hundred and seventy-two (172) feet on land owned and controlled by the Second Party.

Now, therefore, in consideration of one dollar, the receipt of which is hereby acknowledged, and of benefits to the Second Party it is agreed between the parties.

(1) That the First Party will construct said sidetrack as above

619 (Sheet 2 of 4 sheets.)

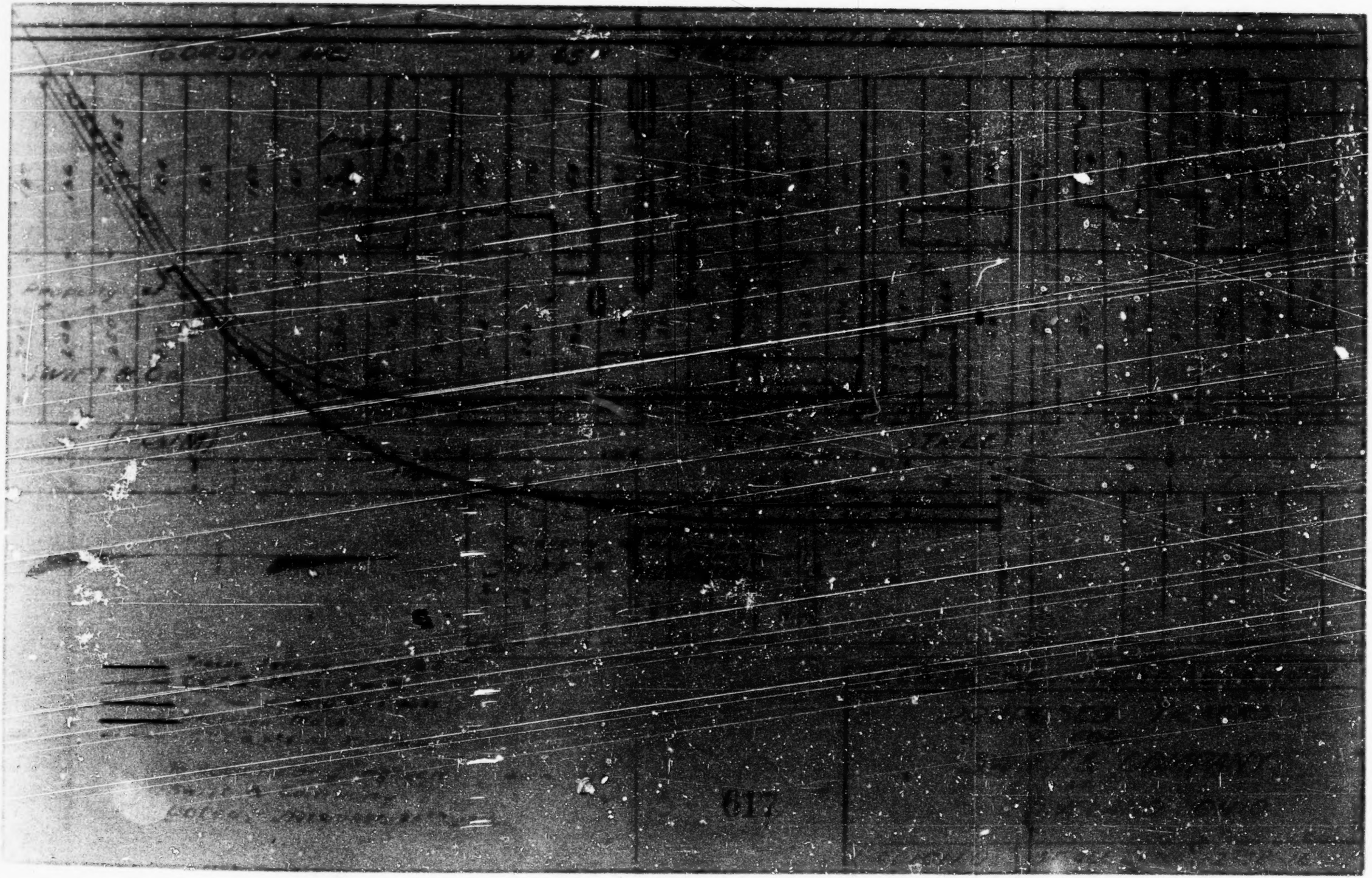
indicated, upon the following terms and conditions:

"A." The First Party shall, at its own expense, construct the roadway and necessary waterway for said track and furnish all the material for the track superstructure and lay the same.

"B." The Second Party shall give to the First Party all its in- and out-bound freight business which it can control provided First Party gives rates equal to those of its competitors.

(2) That said side track shall be maintained by the First Party, and the cost thereof shall be borne by the First Party.

(3) That the ownership and control of said track shall be vested solely in the First Party, and Second Party hereby disclaims ownership in any portion of said side track. The First Party shall have the right to use, without cost, the whole or any part of said siding in connection with other business than that of the Second Party, when such use of the siding will not interfere with the business of the Second Party.


617

(4) That the Second Party or its assigns without the written consent of the First Party, will not direct or authorize the use of said track by or for the benefit of any other party not one of the parties hereto.

(5) That it shall be the duty of the Second Party, in moving any car placed upon said track, to avoid fouling or obstructing the main or other tracks of the First Party. It shall also be the duty of the Second Party to keep said track free from any obstructions which may endanger First Party's employes in dis-

620 (Sheet 3 of 4 sheets.)

charging their duties as trainmen. It shall also be the duty of the Second Party, when First Party is moving any car or cars upon said track to keep its employees and persons upon the premises having business with it, from occupying or being upon or near any car on said track. For the failure to perform any such duty, said Second Party does hereby assume liability and indemnifies and saves harmless the First Party. The Second Party does also assume all liability for obstructions of any street, highway or alley by said track or from the uses thereof.

(6) That the First Party, its successors and assigns, shall have the right at any time after sixty (60) days' notice in writing to the Second Party to discontinue use of said track and remove all of the same belonging to the First Party and to enter upon the property of the Second Party for the purpose of removing so much of said side track belonging to the First Party as may be located thereon, the First Party in such case to commit no unnecessary injury to the property of the Second Party.

(7) That the Second Party reserves the right to have removed at any time upon sixty (60) days' notice in writing to the First Party, so much of said track located on land of said Second Party ownership of which is vested in said First Party.

(8) That with full knowledge of the difficulty of preventing the emission of sparks and fire from engines and trains it is expressly stipulated, agreed, and understood that as a part of

621 (Sheet 4 of 4 sheets.)

the consideration for the execution of this agreement, the Second Party is to assume all risk of fires and the danger thereof to any property or structure of said Second Party on account of the use of said side track, to save harmless the First Party from all liability for damage by fire, to any such property or structure which in the operation of First Party's road may accidentally or negligently be communicated to any such property or structure, anything in any law of the State of Ohio to the contrary notwithstanding.

In testimony whereof, the parties hereto have caused this agreement to be executed in duplicate the day and year first above written.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY CO.,
By (Signed) J. Q. VAN WINKLE.
General Manager.

Approved:

G. H. SMITH,
Chief Engineer.
L. J. H.

Witnesses:
A. R. F.
F. A. WALKER.
A. F. EVANS.
E. R. BONNELL.

PEOPLES PACKING COMPANY,
By (Signed) H. C. THOM.
Witnesses:
A. KATZ (?).

Inscribed on back: #2778 Original Agreement Between the CCC & St. L. Rwy. Co. and Peoples Packing Co., October 27, 1910. Siding at Cleveland, O. Superseded by # 4278 dated Nov. 25, 1916, with Swift & Co.

622 *Exhibit No. 20*

(Sheet 1 of 6 sheets.)

This Exhibit contains Side Track Agreement dated May 25, 1912, between The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Henry C. Thom, doing business as Peoples Packing Company.

623 (Sheet 2 of 6 sheets.)

Contract # 2778–A

This agreement, made as of the twenty-fifth (25th) day of May, in the year 1912, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation existing under and by virtue of the laws of the States of Ohio and Indiana, as First Party, and Henry C. Thom, doing business under the firm name of the Peoples Packing Company of Cleveland, Ohio, as Second party, witnesseth:

Whereas, the Second Party desires the extension and rearrangement of a sidetrack at West Sixty-third Street (Prim Street) Cleveland, Cuyahoga County, Ohio, on the Cleveland Division

of The Cleveland Cincinnati, Chicago and Saint Louis Railway Company, as shown on the blue print hereto attached, which is made a part of this agreement. Said side track to be connected with the existing side track serving the Peoples Packing Company of the Division aforesaid, on the south side thereof extending southwardly about one hundred and eight (108) feet to a connection with the proposed track to serve Blumenstock Reid Company, all on land owned and controlled by the Second Party.

Now, therefore, in consideration of one dollar ($1.00), the receipt of which is hereby acknowledged, and of benefits to the Second Party it is agreed between the parties:

1. That the First Party will construct said sidetrack as above indicated upon the following terms and conditions:

624 (Sheet 3 of 6 sheets.)

A. The First Party shall, at its own expense, construct the roadway and necessary waterway for said rearrangement and extension of sidetrack, furnish all the material for the track superstructure and lay the same.

B. The Second Party shall give to the First Party all its in- and out-bound freight business which it can control provided First Party gives rates equal to those of its competitors.

2. That said sidetrack shall be maintained by the First Party, and the cost thereof shall be borne by the First Party.

3. That the ownership and control of said track shall be vested solely in the First Party and Second Party hereby disclaims ownership in any portion of said sidetrack. The First Party shall have the right to use, without cost, the whole or any part of said siding in connection with other business than that of the Second Party, when such use of the siding will not interfere with the business of the Second Party.

4. That the Second Party, or its assigns, without the written consent of the First Party, will not direct or authorize the use of said track by or for the benefit of any other party not one of the parties hereto.

5. That it shall be the duty of the Second Party, in moving any car placed upon said track, to avoid fouling or

625 (Sheet 4 of 6 sheets.)

obstructing the main or other tracks of the First Party. It shall also be the duty of the Second Party to keep said track free from any obstructions which may endanger First Party's employes in discharging their duties as trainmen. It shall also be the duty of the Second Party, when First Party is moving any car or cars upon said track to keep its employees and persons upon the premises having business with it, from occupying or being upon or near any car on said track. For the failure to perform any such duty, said Second Party does hereby assume liability and

indemnifies and saves harmless the First Party. The Second Party does also assume all liability for obstructions of any street, highway or alley by said track or from the uses thereof.

6. That the First Party, its successors and assigns, shall have the right at any time after sixty (60) days' notice in writing to the Second Party to discontinue u ' of said track and remove all of the same belonging to the First Party and to enter upon the property of the Second Party for the purpose of removing so much of said sidetrack belonging to the First Party as may be located thereon, the First Party in such case to commit no unnecessary injury to the property of the Second Party.

626 (Sheet 5 of 6 sheets.)

7. That the Second Party reserves the right to have removed at any time upon sixty (60) days' notice in writing to the First Party, so much of said track located on land of said Second Party the ownership of which is vested in said First Party.

8. That with full knowledge of the difficulty of preventing the emission of sparks and fire from engines and trains it is expressing stipulated, agreed and understood, that as a part of the consideration for the execution of this agreement, the Second Party is to assume all risk of fires and the danger thereof to any property or structure of said Second Party on account of the use of said sidetrack, to save harmless the First Party from all liability for damage by fire, to any such property or structure which in the operation of First Party's road may accidentally or negligently be communicated to any such property or structure, anything in any law of the State of Ohio to the contrary notwithstanding.

In testimony whereof, the parties hereto have caused this agreement to be executed in duplicate the day and year first

627 (Sheet 6 of 6 sheets.)

above written.

THE CLEVELAND CINCINNATI CHICAGO AND SAINT LOUIS RAILWAY COMPANY.

By (Sgd.) J. D. VAN WINKLE,

PEOPLES PACKING COMPANY.

By H. C. THOM.

Witnesses:

J. C. KIRBY.

E. MEYER

Approved: L. J. H.

R. G. M.

T. G. S.

Witnesses:

R. D. BROWN.

H. W. QUIGLEY.

628 *Exhibit No. 21*

(Sheet 1 of 7 sheets.)

This Exhibit contains Side Track Agreement between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company and Federal Packing Company, dated March 28, 1927; and Letter dated May 5, 1931, indicating agreement of March 28, 1927, superseded by agreement dated Nov. 24, 1930.

629 (Sheet 2 of 7 sheets.)

SIDE TRACK AGREEMENT

(Existing Track)

Contract #7523

This Agreement, made and executed in duplicate this Twenty-eighth (28) day of March, 1927, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, and The Federal Packing Company, a corporation under the laws of the State of Ohio, as Second Party, said First Party being hereinafter called the "Railroad," and said Second Party being hereinafter called the "Industry," witnesseth:

Whereas, the Industry has been using and desires to continue to use an existing sidetrack known as Valuation No. 243 connected with the Railroad's line of railroad at Cleveland, Cuyahoga County, Ohio, and it is mutually desired to enter into a formal agreement to cover the ownership, maintenance and use of said track by said Industry.

Now, therefore, it is mutually covenanted and agreed:

First. Said track, as shown in red color on the blueprint hereto attached, dated Feb. 23, 1927, revised Feb. 25, 1927, and made a part of this agreement, shall be owned by the Railroad.

Second. The Industry shall, without expense to the Railroad, obtain all licenses, franchises, or privileges, if any are necessary, for the maintenance and operation of the track in, upon or across any public road, street, or other public property or reservation which may be traversed or intersected

630 (Sheet 3 of 7 sheets.)

thereby, and the necessary right-of-way for the portion of the track extending beyond the Railroad right-of-way; and the Industry shall assume all of the obligations imposed in such licenses, franchises, or privileges and shall indemnify and hereby agrees to save harmless the Railroad from any and all of the ob-

ligations imposed in said licenses, franchises, or privileges, or any expense in connection therewith or incident thereto, and from any and all obligations hereafter imposed by public officers, or by law, and any expense in connection therewith or incident thereto, including policing and crossing protection for that portion of said track in, upon or across such public highway or property which may be traversed or intersected thereby.

Third. The Industry shall, on the part of itself and its officers, agents, and employes, keep said track clear of obstructions and shall not place or allow any temporary or permanent structure or other obstruction of any kind to be placed by its officers, agents, or employes, within the space of twenty-two (22) feet above the said track or within seven and a half (7½) feet on either side of the center line of said track.

Fourth. The Railroad shall have the right to cease, forthwith and without notice, all operations upon said track, if compelled so to do by the owners, other than the respective parties hereto, of any portion of said track, or of the land

631 (Sheet 4 of 7 sheets.)

upon which said track, or any portion thereof, may be laid.

Fifth. Except only as the parties hereto shall in writing stipulate otherwise, all provisions herein as to the aforementioned track shall apply to any and all additions thereto and/or extensions thereof, and to any and all additions to or extensions of said track of the Railroad; and maps or prints, approved by the parties hereto, showing such additions and/or extensions may, at the option of the Railroad, be by it annexed hereunto or to its original hereof and shall thereby become and be a part of this agreement.

Sixth. The Railroad may use the said track for general railroad purposes and expressly reserves the right to connect such part of said track as may be on its premises with other tracks for its own use or that of third parties.

The Industry agrees not to extend such part of said track as may be on the premises owned, controlled, or occupied by the Industry, or to connect same with any other track, or permit the use thereof by anyone not a party hereto, without first obtaining the written consent of the Railroad.

Seventh. It is understood that the movement of Railroad's locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad's negligence, arising from fire caused by locomotives operated

632 (Sheet 5 of 7 sheets.)

by the Railroad on said track, or in the vicinity thereof for the purpose of serving said Industry, except to the premises of the Railroad and to rolling stock belonging to the Railroad or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless the Railroad for loss, damage or injury from any act or omission of the Industry, its employes or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person or corporation, while on or about said track; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.

The term "Railroad" under this Article shall include the tenants and licensees of First Party.

Eighth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect; such notice on the part of the Railroad may, at its option, be given by posting it upon a conspicuous part of the premises, and this agreement, in such case shall terminate thirty (30) days after such posting; after which period either party may remove all property belonging to it under this agreement, except as herein otherwise provided.

Until terminated as above provided, this agreement shall

633 (Sheet 6 of 7 sheets.)

inure to the benefit of and be binding upon the successors and assigns of the parties hereto; provided, however, that, as to the Industry, no assignment of this agreement shall be valid without the written consent of the Railroad.

Ninth. It is understood and agreed that this contract shall apply to all portions of the track shown on the blueprints attached as hereinbefore provided, which may have been constructed under this or any other agreement or otherwise prior to the making of this contract, which portions shall be and become subject to all of its terms applicable subsequent to construction, as fully as though originally constructed, maintained, and operated hereunder.

In witness whereof, the parties hereto have duly executed this agreement in duplicate this 28th day of March, 1927.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY.

By C. S. MILLARD, *General Manager.*

THE FEDERAL PACKING COMPANY,

By F. C. THORNTON, *President.*

Approved:
H. N. QUIGLEY,
General Counsel.
HADLEY BALDWIN,
Chief Engineer.
J. D. B.
W. H. SULLIVAN,
Gen. Supt. C. T. D.
Attest:
[SEAL] A. V. CUNNING, *Secretary.*

634 (Sheet 7 of 7 sheets.)

CINCINNATI, O., *May 5, 1931.*

Subject: Contract #7523.
Mr. J. E. ANDERSON, *Traffic Manager.*

Please refer to contract #7323, dated March 28, 1927, with Federl Packing Co., covering use of an existing sidetrack at Cleveland, O.

Chief Engineer Baldwin advises that contract of November 24, 1930, with this company, our number 8726, supersedes the above mentioned agreement, and I will thank you to mark your records accordingly.

(Signed) R. F. DAVIES,
Assistant General Auditor.

LPW–r.
cc—Industrial Dept. Sup't. Cleve-Ind'pls Div. Gen. Supt. Sullivan, Cleve. O. Supt. Bell, Cleve. O. CCA Brunks. Auditor of Disb.

635 *Exhibit No. 22*

(Sheet 1 of 7 sheets.)

This Exhibit contains Side Track Agreement dated Nov. 24, 1930, between The New York Central Railroad Company and the Federal Packing Company; and

Assignment by the Federal Packing Company to Swift & Co., April 2, 1938.

636 (Sheet 2 of 7 sheets.)

SIDETRACK AGREEMENT

(Existing Track)

This Agreement, made this twenty-fourth (24) day of November 1930, between The New York Central Railroad Company, Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, a corporation, as First Party, and the Federal Packing Company

a corporation under the laws of the state of Ohio, as Second Party, said First Party being hereinafter called the "Railroad," and said Second Party being hereinafter called the "Industry," witnesseth:

Whereas the Industry desires and has requested the Railroad for permission to use a portion of an existing sidetrack known as Val. No. 243 connected with the Railroad's line of railroad at Cleveland, Cuyahoga County, Ohio, such portion of track being hereinafter referred to as "track".

Now, therefore, it is mutually covenanted and agreed:

First. Said track, as hown in red color on the blueprint hereto attached, dated November 18, 1930, and made a part of this agreement, shall be owned by said First Party's Lessor.

Second. The Industry shall, without expense to the Railroad, obtain all licenses, franchises, or privileges, if any are necessary, for the maintenance and operation of the track in, upon or across any public road, street, or other public

637 (Sheet 3 of 7 sheets.)

property or reservation which may be traversed or intersected thereby, and the necessary right-of-way for the portion of the track extending beyond the Railroad right-of-way; and the Industry shall assume all of the obligations imposed in such licenses, franchises, or privileges and shall indemnify and hereby agrees to save harmless the Railroad from any and all of the obligations imposed in said licenses, franchises, or privileges, or any expense in connection therewith or incident thereto, and from any and all obligations hereafter imposed by public officers, or by law, and any expense in connection therewith or incident thereto, including policing and crossing protection for that portion of said track in, upon or across such public highway or property which may be traversed or intersected thereby.

Third. The Industry shall, on the part of itself, and its officers, agents, and employes, keep said track clear of obstructions and hereafter shall not place or allow any temporary or permanent structure or other obstruction of any kind to be placed by its officers, agents, or employes, within the space of twenty-two (22) feet above the said track or within eight and one-half (8½) feet on either side of the center line of said track.

Fourth. The Railroad shall have the right to cease forthwith and without notice, all operations upon said track, if compelled so to do by the owners, other than the respective

638 (Sheet 4 of 7 sheets.)

parties hereto, of any portion of said track, or of the land upon which said track, or any portion thereof, may be laid.

Fifth. Except only as the parties hereto shall in writing otherwise stipulate, all provisions hereof as to the aforesaid track shall

apply to any and all additions thereto and/or extensions thereof, and to any and all additions to or extensions of said track of the Railroad; and maps or prints, approved by the parties hereto, showing such additions and/or extensions may, at the option of the Railroad, be by it annexed hereunto or to its original hereof and shall thereby become and be a part of this agreement.

Sixth. The Railroad may use the said track for general railroad purposes and expressly reserves the right to connect such part of said track as may be on its premises with other tracks for its own use or that of third parties.

The Industry agrees not to extend such part of said track as may be on the premises owned, controlled, or occupied by the Industry, or to connect same with any other track, or permit the use thereof by anyone not a party hereto without first obtaining the written consent of the Railroad.

Seventh. It is understood that the movement of Railroad's locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad's negligence,

639 (Sheet 5 of 7 sheets.)

arising from fire caused by locomotives operated by the Railroad on said track, or in the vicinity thereof for the purpose of serving said Industry, except to the premises of the Railroad and to rolling stock belonging to the Railroad or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless the Railroad for loss, damage, or injury from any act or omission of the Industry, its employes or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person or corporation; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.

The term "Railroad" under this Article shall include the tenants and licensees of said First Party.

Eighth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect; such notice on the part of the Railroad may, at its option, be given by posting it upon a conspicuous part of the premises, and this agreement, in such case, shall terminate thirty (30) days after such posting; after which period either party may remove all property belonging to it under this agreement.

Until terminated as above provided, this agreement shall inure to the benefit of and be binding upon the

640 (Sheet 6 of 7 sheets.)

successors, assigns, and/or lessees of the parties hereto; provided, however, that, as to the Industry, no assignment of this agreement shall be valid without the written consent of the Railroad.

Ninth. It is understood and agreed that this contract shall apply to all portions of the track shown on the blueprints attached as hereinbefore provided, which may have been constructed under this or any other agreement or otherwise prior to the making of this contract, which portions shall be and become subject to all of its terms applicable subsequent to construction, as fully as though originally constructed, maintained, and operated hereunder.

In witness whereof, the parties hereto have duly executed this agreement in duplicate the day and year first above written.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By (Sgd.) C. S. MILLARD, *General Manager.*

THE FEDERAL PACKING COMPANY,

[SEAL]

By (Sgd.) GEORGE J. STEWART, *Vice President.*
(Sgd.) HADLEY BALDWIN, *Chief Engineer.*
(Sgd.) W. H. SULLIVAN, *General Supt.*
(Sgd.) J. D. BELL, *Superintendent.*

As to form:
(Sgd.) H. H. QUIGLEY,
(Sgd.) A. F. M. *General Counsel.*

Attest: (?).
(Sgd.) J. E. CORBY, *Secretary.*

Approved as to form:
R. C. M. (Sgd.) H. S.
(Sgd.) H. W. T.
J. J. H. (Sgd.) T. J. E. W. (Sgd.) S.
(Sgd.) H. C. T.
R. G. H. (Sgd.) R.
(Sgd.) F. F. F.

641 (Sheet 7 of 7 sheets.)

For Value Received, The Federal Packing Company, an Ohio corporation, hereby assigns and transfers to Swift and Company, an Illinois corporation, all right, title, and interest in and to that certain track agreement dated November 24, 1930, between The New York Central Railroad Company and The Federal Packing Company, providing for the operation and maintenance of a

sidetrack near West 63rd Street in the City of Cleveland, County of Cuyahoga, State of Ohio.

In consideration whereof, said Swift and Company hereby agrees to observe and perform all covenants and conditions of said agreement to be performed by said The Federal Packing Company from and after the date hereof.

In witness whereof, the parties have caused these presents to be executed by their duly authorized officers, this 2nd day of April 1938.

THE FEDERAL PACKING COOMPANY,
[SEAL] By GEORGE J. STEWART,
Vice President.

SWIFT AND COMPANY,
By WM. B. TRAYNOR,
Vice President.

R. E. F.

The New York Central Railroad Company (Lessee of The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company) hereby consents to the foregoing assignment.

THE NEW YORK CENTRAL
RAILROAD COMPANY,
By A. E. LLOYD,
Assistant General Manager.

Approved as to Form:
W. H. KING,
General Attorney,
New York Central R. R. Co.
W. H. E.: S.

642 *Exhibit No. 23*

(Registry No. 56286–A

(Sheet 1 of 5 sheets.)

SIDE TRACK AGREEMENT

(Existing Track)

This agreement, made and executed in duplicate this Twenty-eighth (28th) day of March 1927, between the Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, and The Hughes Provision Company, a corporation under the laws of the state of Ohio, as Second Party, said First Party being hereinafter called the "Railroad," and said Second Party being hereinafter called the "Industry," witnesseth:

Whereas the Industry has been using and desires to continue to use an existing side track known as Valuation No. 243 connected with the Railroad's line of railroad at Cleveland, Cuyahoga County, Ohio, and it is mutually desired to enter into a formal agreement to cover the ownership, maintenance and use of said track by said Industry,

Now, therefore, it is mutually covenanted and agreed:

First. Said track, as shown in red color on the blueprint hereto attached, dated March 18th, 1927, and made a part of this agreement, shall be owned by the Railroad.

Second. The Industry shall, without expense to the Railroad,

643 (Sheet 2 of 5 sheets.)

obtain all licenses, franchises, or privileges, if any are necessary, for the maintenance and operation of the track in, upon, or across any public road, street, or other public property or reservation which may be traversed or intersected thereby, and the necessary right-of-way for the portion of the track extending beyond the Railroad right-of-way; and the industry shall assume all of the obligations imposed in such licenses, franchises, or privileges and shall indemnify and hereby agrees to save harmless the Railroad from any and all of the obligations imposed in said licenses, franchises, or privileges, or any expense in connection therewith or incident thereto, and from any and all obligations hereafter imposed by public officers, or by law, and any expense in connection therewith or incident thereto, including policing and crossing protection for that portion of said track in, upon or across such public highway or property which may be traversed or intersected thereby.

Third. The Industry shall, on the part of itself and its officers, agents, and employes, keep said track clear of obstructions and shall not place or allow any temporary or permanent structure or other obstruction of any kind to be placed by its officers, agents, or employes, within the space of twenty-two (22) feet above the said track or within seven and a half (7½) feet on either side of the center line of said track.

Fourth. The Railroad shall have the right to cease, forthwith and without notice, all operations upon said track, if

644 (Sheet 3 of 5 sheets.)

compelled so to do by the owners, other than the respective parties hereto, of any portion of said track, or of the land upon which said track, or any portion thereof, may be laid.

Fifth. Except only as the parties hereto shall in writing stipulate otherwise, all provisions herein as to the aforementioned track shall apply to any and all additions thereto and/or extensions thereof, and to any and all additions to or extensions of

said track of the Railroad; and maps or prints, approved by the parties hereto, showing such additions and/or extensions, may, at the option of the Railroad, be by it annexed hereunto or to its original hereof and shall thereby become and be a part of this agreement.

Sixth. The Railroad may use the said track for general railroad purposes and expressly reserves the right to connect such part of said track as may be on its premises with other tracks for its own use or that of third parties.

The Industry agrees not to extend such part of said track as may be on the premises owned, controlled, or occupied by the Industry, or to connect same with any other track, or permit the use thereof by anyone not a party hereto without first obtaining the written consent of the Railroad.

Seventh. It is understood that the movement of Railroad's locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad against loss or damage to property of the Industry or to proper-

645 (Sheet 4 of 5 sheets.)

ty upon its premises, regardless of Railroad's negligence, arising from fire caused by locomotives operated by the Railroad on said track, or in the vicinity thereof for the purpose of serving said Industry, except to the premises of the Railroad and to rolling stock belonging to the Railroad or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless the Railroad for loss, damage, or injury from any act or omission of the Industry, its employes or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person or corporation, while on or about said track; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.

The term "Railroad" under this Article shall include the tenants and licensees of First Party.

Eighth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect; such notice on the part of the Railroad may, at its option, be given by posting it upon a conspicuous part of the premises, and this agreement, in such case, shall terminate thirty (30) days after such posting; after which period either party may remove all property belonging to it under this agreement, except as herein otherwise provided.

Until terminated as above provided, this agreement shall inure to the benefit of and be binding upon the

646 (Sheet 5 of 5 sheets.)

successors and assigns of the parties hereto; provided, however, that, as to the Industry, no assignment of this agreement shall be valid without the written consent of the Railroad.

Ninth. It is understood and agreed that this contract shall apply to all portions of the track shown on the blueprints attached as hereinbefore provided, which may have been constructed under this or any other agreement or otherwise prior to the making of this contract, which portions shall be and become subject to all of its terms applicable subsequent to construction, as fully as though originally constructed, maintained, and operated hereunder.

In witness whereof, the parties hereto have duly executed this agreement in duplicate this 20th day of March 1927.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY.

By (Sgd.) C. S. MILLARD, *General Manager.*

THE HUGHES PROVISION COMPANY,

By (Sgd.) W. HUGHES, *President.*

Approved:

(Sgd.) H. H. QUIGLEY, *General Counsel.*

(Sgd.) HADLEY BALDWIN, *Chief Engineer.*

(Sgd.) W. H. SULLIVAN, *Gen'l Supt.*

C. T. D.

(Sgd.) J. D. B.

Attest:

(Sgd.) J. L. BISTRICKY, *Secretary.*

647 *Exhibit No. 2;*

(Registry No. 56351-A)

(Sheet 1 of 7 sheets.)

Exhibit contains: Side Track Agreement, dated August 1, 1922, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company and Koblenzer Brothers.

648 (Sheet 2 of 7 sheets.)

SIDE TRACK AGREEMENT

(Existing Track)

This Agreement, made and executed in duplicate this first (1st) day of August 1922, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, and Christian Koblenzer and Matthias Koblenzer, composing a partnership and doing business under the name of Koblenzer

Brothers, as Second Party, said First Party being hereinafter called the "Railroad," and said Second Party being hereinafter called the "Industry," witnesseth:

Whereas, the Industry desires and has requested the Railroad for permission to use a sidetrack connected with the Railroad's line of railroad in the City of Cleveland, Cuyahoga County, Ohio; relative to a portion of which track said Railroad and The Hartman Provision Company (predecessor company of said Industry hereto), entered into an agreement dated February 28, 1913.

Now, therefore, it is mutually covenanted and agreed:

First. Said track, as shown in red color on the blueprint hereto attached, dated July 20, 1922, and made a part of this
649 (Sheet 3 of 7 sheets.)
agreement, shall be owned by said Railroad.

Second. The Industry shall, without expense to the Railroad, obtain all licenses, franchises, or privileges, if any are necessary, for the maintenance and operation of the track in, upon or across any public road, street, or other public property or reservation which may be traversed or intersected thereby, and the necessary right-of-way for the portion of the track extending beyond the Railroad right-of-way; and the industry shall assume all of the obligations imposed in such licenses, franchises, or privileges and shall indemnify and hereby agrees to save harmless the Railroad from any and all of the obligations imposed in said licenses, franchises, or privileges, or any expense in connection therewith or incident thereto, and from any and all obligations hereafter imposed by public officers, or by law, and any expense in connection therewith or incident thereto, including policing and crossing protection for that portion of said track in, upon, or across such public highway or property which may be traversed or intersected thereby.

Third. The Industry shall, on the part of themselves and their officers, agents, and employes, keep said track clear of obstructions and shall not place or allow any temporary or permanent structure or other obstruction of any kind to be placed by their officers, agents, or employes, within the space of twenty-one (21) feet above the said track or within seven
650 (Sheet 4 of 7 sheets.)
and one-half (7½) feet on either side of the center line of said track.

Fourth. The Railroad shall have the right to cease, forthwith and without notice, all operations upon said track, if compelled so to do by the owners, other than the respective parties hereto, of any portion of said track, or of the land upon which said track, or any portion thereof, is laid.

Fifth. Except only as the parties hereto shall in writing stipu-

late otherwise, all provisions herein as to the aforementioned track shall apply to any and all additions thereto and/or extensions thereof, and to any and all additions to or extensions of said track of the Railroad; and maps or prints, approved by the parties hereto, showing such additions and/or extensions may, at the option of the Railroad, be by it annexed hereunto or to its original hereof and shall thereby become and be a part of this agreement.

Sixth. The Railroad may use the said track for general railroad purposes and expressly reserves the right to connect such part of said track as may be on its premises with other tracks for its own use or that of third parties.

The Industry agrees not to extend such part of said track as may be on the premises owned, controlled, or occupied by the Industry, or to connect same with any other track, or permit the use thereof by anyone not a party hereto, without first obtaining

651 (Sheet 5 of 7 sheets.)

the written consent of the Railroad.

Seventh. It is understood that the movement of Railroad's locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad's negligence, arising from fire caused by locomotives operated by the Railroad on said track, or in its vicinity for the purpose serving said Industry, except to the premises of the Railroad and to rolling stock belonging to the Railroad or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless the Railroad for loss, damage, or injury from any act or omission of the Industry, its employes or agents, to the person or property of the parties hereto and their employes, and to the person or property of any other person or corporation, while on or about said track, and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.

Eighth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect; such notice on the part of the Railroad may, at its option, be given by posting it upon a conspicuous part of the premises, and this agreement, in such case, shall terminate thirty (30)

652 (Sheet 6 of 7 sheets.)

days after such posting; after which period either party may remove all property belonging to it under this agreement, except as herein otherwise provided.

Until terminated as above provided, this agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors, and assigns of the parties hereto; provided, however, that, as to the Industry, no assignment of this agreement shall be valid without the written consent of the Railroad.

Ninth. It is understood and agreed that this contract shall apply to all portions of the track shown on the blueprints attached as hereinbefore provided, which may have been constructed under this or any other agreement or otherwise prior to the making of this contract, which portions shall be and become subject to all of its terms applicable subsequent to construction, as fully as though originally constructed, maintained, and operated hereunder.

Tenth. This agreement shall supersede said agreement of February 28, 1913.

In witness whereof, the parties hereto have fully executed
653 (Sheet 7 of 7 sheets.)
this agreement in duplicate this first (1st) day of August 1922.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,
By (Sgd.) E. M. COSTIN, *General Manager.*
KOBLENZER BROTHERS,
By (Sgd.) MATTH KOBLENZER.
By (Sgd.) CHRIST KOBLENZER.

Approved:
(Sgd.) H. N. QUIGLEY, *General Attorney.*
(Sgd.) C. A. PAQUETTE, *Chief Engineer.*
Approved:
(Sgd.) B. C. B., *General Superintendent.*
O. K. (Sgd.) T. J. H.
(Sgd.) L. S. R.
Witnesses:
(Sgd.) E. GALBRAITH.

654 *Exhibit No. 25*

(Sheet 1 of 4 sheets.)

This agreement, made as of the twenty-seventh (27th) day of November in the year 1916, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party and The Theurer-Norton Provision Company, a corporation, as Second Party, witnesseth:

Whereas pursuant to an agreement between the parties hereto dated June 9th, 1911, the First Party constructed and owns a sidetrack at Cleveland, Cuyrhoga County, Ohio, on First Party's Cleveland Division, and

Whereas the Second Party desires the shifting of the cross-over of one hundred and twenty-three (123) feet as shown by broken red lines to the location shown by a solid yellow line, of which eighty-seven (87) feet shall be on the land of the First Party and thirty-six (36) feet on the land of the Second Party, and also desires the construction of an additional sidetrack of three hundred and seventy (370) feet as shown by a solid yellow line. Said additional track to be connected with First Party's Prim Street sidetrack on the east side thereof extending northwardly about three hundred and seventy (370) feet of which sixty (60) feet shall be on land of the First Party and about three hundred and ten (310) feet in and along West Sixty-third Street, and

Whereas the First Party has constructed and owns a sidetrack of about one hundred and sixty-five (165) feet on the land of the Second Party as shown by a solid red line All of said tracks and cross-over being shown upon blue print hereto attached and made part hereof.

655 (Sheet 2 of 4 sheets.)

Now, therefore in consideration of One Dollar ($1.00), the receipt of which is hereby acknowledged, and of benefits to the Second Party, it is agreed between the parties:

1. That the First Party shall shift said cross-over and construct the said additional track as above indicated, upon the following terms and conditions:

(a) Before the commencement of work by the First Party, the Second Party shall pay to the First Party the estimated cost of the labor and additional material, including the ballast, necessary for the shifting of said cross-over and the estimated cost of the additional track superstructure and ballast and the labor of laying both of same and upon completion of the work the difference between the actual cost and the estimated cost shall be paid by the Second Party, to the First Party, or, returned by the First Party to the Second Party, as the case may be.

(b) The Second Party shall, at its own expense, construct the roadway, necessary waterways, and waterway structures and rearrange the street paving for said additional track and cross-over to the satisfaction and approval of the First Party.

(c) The First Party shall furnish the additional material and labor for and shift said cross-over and furnish the material for the superstructure for the additional track, including ballast, bumping post, and the labor for laying and placing same.

2. That said existing side track and cross-over shall be maintained by the First Party at its own expense. The Second Party shall, at its own expense maintain said additional track and street paving and it hereby agrees to indemnify and save harmless the First Party from all liability for damage, injury, or expense during

the use of or resulting from the failure to maintain said additional track and street paving.

3. That the ownership and control of said existing side track and cross-over is and shall be vested solely in the First Party and the ownership and control of said additional sidetrack shall be vested solely in the Second Party. The First Party shall have the right to use, without cost, the whole or any part of its said sidetrack and cross-over in connection with other business than that of the Second Party. The

656 (Sheet 3 of 4 sheets.)

First Party shall have the right to use, without cost, the whole or any part of Second Party's said additional sidetrack in connection with other business than that of the Second Party when such use will not materially retard the use thereof by or for the Second Party.

4. That the Second Party, without the written consent of the First Party, will not direct or authorize the use of said tracks and cross-over by or for the benefit of any other party not one of the parties hereto. In the event the Second Party sells or leases its said additional sidetrack or sells or leases the premises served by said additional track or cross-over the grantee or lessee shall acquire no interest in the said existing track or cross-over of the First Party or right to service upon any of said sidetracks and cross-over until he shall have contracted in writing with the First Party for such interest or such service.

5. That it shall be the duty of the Second Party, in moving any car placed upon said tracks and cross-over, to avoid fouling or obstructing the main or other tracks of the First Party. It shall also be the duty of the Second Party to keep said tracks and cross-over free from any obstructions which may endanger First Party's employes in discharging their duties as trainmen. It shall also be the duty of the Second Party, when First Party is moving any car or cars upon said tracks and cross-over to keep its employes and persons upon the premises having business with it, from occupying or being upon or near any car on said tracks and cross-over. For the failure to perform any such duty, said Second Party does hereby assume liability and indemnifies and saves harmless the First Party. The Second Party does also assume all liability for obstructions of any street, highway, or alley by said tracks and cross-over or from the uses thereof.

6. That the First Party, its successors and assigns, shall have the right at any time after sixty (60) days' notice in writing to the Second Party to discontinue use of said tracks and cross-over and remove all of the same belonging to the First Party, and to enter upon the property of the Second Party for the purpose of removing so much of said sidetracks and cross-over belonging to

the First Party as may be located thereon, the First Party in such case to commit no unnecessary injury to the property of the Second Party. The First Party shall also have the right upon said notice to remove Second Party's turnout in said additional track connecting with First Party's track and the Second Party shall, upon presentation of bill therefor, pay to the First Party the cost of removing said turnout.

7. That the Second Party reserves the right to have removed at any time upon sixty (60) days' notice in writing to the First Party, so much of said tracks and cross-over located on land of said Second Party, the ownership of which is vested in said First Party and to remove its said additional track.

657 (Sheet 4 of 4 sheets.)

8. The Second Party hereby indemnifies and agrees to save harmless the First Party from any loss, damage, or injury by fire originating in or from the use of said tracks and cross-over or any connecting track and affecting the property or person of anyone upon the premises served by said tracks and cross-over. Also from any loss, damage, or injury by fire originating upon the premises served by said tracks and cross-over from any negligence of the Second Party, and communicated directly or indirectly to property or persons upon other premises.

9. The Second Party shall, at its own expense, secure from the proper officers of Cleveland, Ohio, authority for rearranging said cross-over and for the construction, maintenance, operation over, and removal of said additional sidetrack in and along West Sixty-third Street. The Second Party hereby agrees to assume the obligations imposed upon the First Party by the City of Cleveland in its permission for the construction of said additional sidetrack and the Second Party further agrees to indemnify and save harmless the First Party from any expense whatsoever, because of or incident thereto.

10. This agreement shall supersede the said agreement of June 9th, 1911.

In testimony whereof, the parties hereto have caused this agreement to be executed in duplicate the day and year first above written.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,

By (Sgd.) H. A. WORCESTER,
Vice President & General Manager.

THE THEURER-NORTON PROVISION COMPANY,

[SEAL] By (Sgd.) JOHN THEURER, *President.*

Witnesses:
(Sgd.) W. H. GIBSON.
(Sgd.) RUTH H. MILLER.

Approved:
(Sgd.) C. A. PAQUETTE, *Chief Engineer.*
(Sgd.) L. J. H.
Attest:
(Sgd.) M. G. TEUFEL, *Secretary.*

658 *Exhibit No. 26*

(Sheet 1 of 4 sheets.)

CONTRACT No. 4231

C. C. C. & ST. L. RY. CO.

THEURER-NORTON PROVISION CO.

SWIFT & CO.

Construction of an extension to Swift & Co.'s track No. 1 at W. 63rd St., Cleveland, Ohio

MARCH 15, 1917.

This agreement, made as of the fifteenth (15th) day of March in the year 1917, between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, The Theurer-Norton Provision Company, a corporation, as Second Party, and Swift and Company, a corporation, as Third Party, witnesseth:

Whereas the Second Party desires the construction of a side track extension at Cleveland, Cuyahoga County, Ohio, on its Cleveland Division, as shown by a solid yellow line upon blueprint hereto attached and made part hereof. Said track extension is to be connected on the north end with a proposed track numbered One (1) for the Third Party, extending northwardly four hundred and twenty (420) feet on the property of the Second Party.

Now, therefore, in consideration of One Dollar ($1.00), the receipt of which is hereby acknowledged and of benefits to the Second Party, it is agreed between the parties:

1. That the First Party will construct said track extension as above indicated upon the following terms and conditions:

(a) Before the commencement of work by the First Party,

659 (Sheet 2 of 4 sheets.)

the Second Party shall pay to the First Party the estimated cost of the track extension superstructure, including cinders, and the labor of laying and placing all of same, and upon completion of the work the difference between the actual cost and the esti-

mated cost shall be paid by the Second Party to the First Party, or returned by the First Party to the Second Party, as the case may be.

(b) The Second Party shall, at its own expense, construct the roadway, necessary waterways and waterway structures for said track extension to the satisfaction and approval of the First Party.

(c) The First Party shall furnish the material for the track extension superstructure, including cinders, and the labor of laying and placing all of same.

2. That said extension superstructure shall be maintained by the First Party, and the cost thereof shall be borne by the Second Party. The roadway, necessary waterways, and waterway structures shall be maintained by the Second Party at its own expense and it agrees to indemnify and save harmless the First Party from all liability for damage, injury, or expense during the use of or resulting from the failure to properly maintain said roadway, necessary waterways, and waterway structures.

3. That the ownership and control of said track extension shall be vested solely in the Second Party. The First Party shall have the right to use, without cost, the whole or any part of said extension in connection with other business than that of the Second Party, when such use will not materially retard the use thereof by or for the Second Party.

4. That the Second Party, without the written consent of the First Party, will not direct or authorize the use of said track extension by or for the benefit of any other party not one of the parties hereto. In the event the Second Party sells or leases said track extension or the premises served by same, the grantee or lessee or any other party shall acquire no right to service upon said track extension until he shall have contracted in writing with the First Party for such service.

5. That it shall be the duty of the Second Party, in moving any car placed upon said track extension, to avoid fouling or obstructing any connecting track of the First Party. It shall also be the duty of the Second Party to keep said track extension free from any obstructions which may endanger First Party's employes in discharging their duties as trainees.

660 (Sheet 3 of 4 sheets.)

It shall also be the duty of the Second Party, when First Party is moving any car or cars upon said track extension to keep its employes and persons upon the premises having business with it, from occupying or being upon or near any car on said track extension. For the failure to perform any such duty, said Second Party does hereby assume liability and indemnifies and serves harmless the First Party.

6. That the First Party, its successors and assigns, shall have the right at any time after sixty (60) days' notice in writing to the Second Party to discontinue use of said track extension. In the event that the First Party is prohibited the use of that portion of track numbered One (1) owned by the Third Party, the First Party shall, without prior notice to the Second Party, have the right to discontinue the use of said track extension.

7. That the Second Party reserves the right to have removed at any time upon sixty (60) days' notice in writing to the First Party said track extension.

8. That the Second Party hereby indemnifies and agrees to save harmless the First Party from any loss, damage, or injury by fire originating in or from the use of said track extension or any connecting track and affecting the property or person of anyone upon the premises of the Second Party served by same. Also from any loss, damage, or injury by fire originating in or from the use of said track extension or any connecting track by or for the Second Party and affecting the property or person of anyone upon the premises served by said connecting track. Also from any loss, damage, or injury by fire originating upon the premises served by said track extension and connecting track from any negligence of the Second Party, and communicated directly or indirectly to property or persons upon other premises.

9. It is agreed that the First Party shall be and is hereby indemnified and protected against all claims for rental on account of the use of the Third Party's said track by or for the Second Party.

10. The Third Party hereby consents to the construction, maintenance, operation over and removal of said track extension in accordance with the conditions above mentioned.

In testimony whereof, the parties hereby have caused this agreement to be executed in triplicate the day and year first above written.

661 (Sheet 4 of 4 sheets.)

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,
By H. A. WORCESTER,
Vice President and General Manager.
THE THEURER-NORTON PROVISION COMPANY,
By JOHN THEURER, *President.*
SWIFT AND COMPANY,
By L. F. SWIFT, *President.*
R. C. M.
H. N. T.

Witnesses:
W. M. GIBSON.
RUTH K. MILLER.

Approved:
C. A. PAQUETTE, *Chief Engineer.*
L. J. H.
Attest:
[SEAL] M. C. TEUFEL, *Secretary.*
Attest:
[SEAL] C. A. PEACOCK, *Asst. Secretary.*

662 *Exhibit No. 27*

(Registry No. 37377)

(Sheet 1 of 12 sheets.)
Exhibit contains: Side Track Agreement dated January 22, 1934, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, and Theurer-Norton Provision Company.

663 (Sheet 2 of 12 sheets.)

PRIVATE SIDETRACK AGREEMENT

This Agreement, made this 22nd day of January 1924, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway (hereinafter called the Railroad Company), party of the first part, and Theurer-Norton Provision Company, of the City of Cleveland, County of Cuyahoga, State of Ohio (hereinafter called the Industry), party of the second part, witnesseth:

Whereas the Industry has applied to the Railroad Company for a sidetrack connection with the Railroad Company's line of railroad in the City of Cleveland, County of Cuyahoga, and State of Ohio.

Now therefore, in consideration of the covenents and agreements herein contained, and the mutual benefits to be derived thereunder, the parties hereto agree that the said sidetrack shall be maintained subject to the following terms and conditions:

First. The term "track" as used herein includes all track, roadbed, bridges, and other supporting structures or appurtenances used directly in connection therewith, shown in red and yellow.

664 (Sheet 3 of 12 sheets.)
colors on blueprint No. C-6199-K2, dated April 27, 1933, Rev. 1-8-34 hereto attached and made a part of this agreement. The track shall be owned, and the cost of maintaining the same, shall be borne by the parties hereto as follows:

(a) The Industry shall, without cost to the Railroad Company, provide the necessary right-of-way for the portion of the track

extending beyond the Railroad Company's premises, and procure and maintain in effect all grants, licenses, franchises, or permits necessary for the construction, maintenance, and operation of the track, in, upon, or across any public road, street, or other property or reservation which may be traversed or intersected thereby, and assume the obligations imposed in or by reason of such grants, licenses, franchises, or permits, or hereafter imposed by law or other public authority in respect thereof including all taxes, assessments and license fees, policing, and the erection, maintenance, and operation of any crossing gates or other warnings or protection, and indemnify and hold harmless the Railroad Company from any and all cost and expense in connection therewith.

* * * * * *

665 (Sheet 4 of 12 sheets.)

(d) The Industry may, at its own expense, construct over or under said track, hoppers, pits, or other loading or unloading devices, and when constructed they shall come under the provisions of this agreement, and all the terms and conditions thereof applying to the track shall apply with equal force to said hoppers, pits, or other loading or unloading devices except pipe lines which are covered by separate agreement.

(e) The Industry shall submit to the Railroad Company detail plans of hoppers, pits, or other loading or unloading devices, and the construction thereof shall not be commenced until said plans have been approved by the Railroad Company.

(f) The Industry shall, at its own expense, keep said track lettered (copy illegible) clear of ice, snow, and refuse for a distance of eight and

666 (Sheet 5 of 12 sheets.)

one-half feet on both sides of the center line of said track.

(g) If the Industry fails to maintain in safe condition, in the judgment of the Railroad Company, the part of the track which it is required to maintain, the Railroad Company may disconnect the track or refuse to operate over the same when not in such condition.

That part of said tracks colored red on said plan have heretofore been constructed and are owned and shall be maintained by the Railroad Company at its sole cost and expense.

That part of said tracks colored yellow on said plan, including a patent bumping post in the location as indicated by the letter D on said plan, have heretofore been constructed and are owned and shall be maintained by the Industry at its sole cost and expense and to the entire satisfaction of the Chief Engineer of the Railroad Company.

That part of said tracks to be owned and maintained by the

Railroad Company has been constructed prior to the issuance of General Order No. 15.

The patent bumping post in the location as indicated by the letter B on said plan has heretofore been constructed and is owned and shall be maintained by the Railroad Company at its sole cost and expense.

Second. No casinghead gasoline shall be handled on said track without special permission. Other volatile liquids may be

667 (Sheet 6 of 12 sheets.)

handled provided the Industry complies with the regulations contained in ARA Circulars Nos. 2084–B and ES–3, or any regulations amendatory thereof or supplemental thereto, or provides, at its own expense, such safeguards and protective devices as may be necessary to prevent the occurrence of any loss, damage, or injury by reason of the inflammable or combustible nature of the substances handled. The Railroad Company will, if it finds the same necessary, install and maintain, at its own expense, insulated rail joints separating said track from all connecting tracks.

Third. In the event that the Railroad Company shall furnish material or labor herein undertaken to be furnished by the Industry, the Industry shall and will pay to the Railroad Company, promptly upon rendition of bills, the entire cost thereof, inclusive of the Railroad Company's usual percentage charge to cover the expense of superintendence, supervision, and use of tools, handling and storing of material, workmen's compensation and liability insurance, and accounting. Material and labor so furnished shall remain the property of the Railroad Company until such payment is made, and if such payment shall be in default beyond the period of thirty (30) days after bill is rendered, the Railroad Company, in addition to all other remedies may discontinue all operations over and remove said tracks. The Railroad Company may, at its option, before furnishing such material

or

668 (Sheet 7 of 12 sheets.)

labor, require the Industry to advance to the Railroad Company the estimated cost thereof, which advance shall be adjusted to actual cost upon completion of the work.

Fourth. The Industry shall keep said track clear of obstructions, and shall not place or allow any temporary or permanent structures or obstructions of any kind within the space of eight and one-half feet on either side of the center line of said track, or within the space of twenty-one feet above the said track (being the standard clearance for structures of the Railroad Company), except as to the clearances, if any, less than standard shown upon said blueprint; provided, however, that no wire or cable line of

any kind shall be placed or allowed within such further space on either side or above the said track as shall be determined by the Railroad Company in each particular case.

All clearances less than standard shown on said blueprint shall be protected by standard warning guards or signs placed in a manner and located satisfactorily to the duly authorized representative of the Railroad Company. The expense of installing and maintaining such guards or signs shall be borne by the Industry. If the structures or obstructions at said points are changed or removed, the clearance at said points shall then be made not less than standard.

The Industry shall assume and indemnify and hold harmless the Railroad Company for and from any and all liability, loss and ex-

669 (Sheet 8 of 12 sheets.)

pense (including Workmen's Compensation), resulting from loss of life or damage or injury to persons or property (including employees of either of the parties hereto), arising in whole or in part by reason of or in any way resulting from the presence or maintenance of structures or obstructions encroaching upon the aforesaid standard clearances or from the presence of wire or cable lines over or adjacent to said track other than structures or obstructions, wire or cable lines belonging to the Railroad Company of its licensee.

Fifth. The Railroad Company may use the part of said track on its premises and may connect such part with other tracks, and after obtaining the specific written consent of the Industry, may use the part of said track on the premises of the Industry and may connect the same with other tracks, for the operation of its railroad or the use of third parties, provided such use or connection shall not interfere unreasonably with the use of the track, which is the subject of this agreement, for the business of the Industry. In the event of such use or connection to serve other patrons of the Railroad Company, or as a connection with other tracks owned or used by the Railroad Company, there shall be a reduction in the Industry's expense of maintenance and an adjustment of its original outlay, as to the part of said track so used, to be determined by the character and extent of such use.

670 (Sheet 9 of 12 sheets.)

The industry agrees not to extend such part of said track as may be on premises owned, controlled or occupied by the Industry or to connect it with any other track, or permit the use thereof by anyone not a party hereto without first obtaining the written consent of the Railroad Company. In the event of the use thereof by anyone not a party hereto, with such written consent but with-

out entering into a written agreement with the Railroad Company, the Industry shall be responsible for the entire maintenance of such extensions thereto or connection therewith, and shall indemnify the Railroad Company against all liability for loss of life or damage or injury to persons or property by reason of or resulting from such use by others as if the Industry were the sole user.

Sixth. The Industry assumes all responsibility for and shall indemnify and hold harmless the Railroad Company from and against loss or damage to property of the Industry or to property upon the premises of the Industry or upon said track regardless of the Railroad Company's negligence, arising from fire caused by locomotives operated by the Railroad Company for the purpose of serving said Industry, except to the premises of the Railroad Company and the rolling stock belonging to the Railroad Company or to third parties and to shipments then in the common carrier custody of the Railroad Company.

In respect of all loss or damage to property other than by

671 (Sheet 10 of 12 sheets.)

fire caused as aforesaid, or in respect of injury to or death of persons caused by or in connection with the construction, operation, maintenance, use, presence, or removal of said track (a) the Railroad Company shall assume responsibility for and hold the Industry harmless from all losses, damages, claims, and judgments arising from or growing out of the sole actionable acts or omissions of the Railroad Company, its agents or employees; (b) the parties hereto shall equally bear all losses, damages, claims, and judgments arising from or growing out of the joint or concurring actionable acts or omissions of both parties hereto, their respective agents or employees; and (c) the Industry shall assume the responsibility for and save the Railroad Company harmless from all losses, damages, claims, and judgments arising from or growing out of the sole actionable acts or omissions of the Industry, its agents or employees.

Seventh. If at any time or times hereafter the Railroad Company makes any changes in the location or elevation of its line of railroad at the point of connection with said track, the Industry shall, at its own expense, make such changes in the portion of the track to be constructed and maintained by it as may be necessary to accommodate the changes to be made by the Railroad Company.

If the Railroad Company shall, at any time, equip its railroad for operation by electricity, the Railroad Company may install

672 (Sheet 11 of 12 sheets.)

and maintain third rail or overhead trolley and other appurtenances for electrified operation on said track, and the In-

dustry shall reimburse the Railroad Company for the cost of such installation and maintenance beyond the clearance point.

Eighth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect, except that whatever liability may have accrued to either party as against the other, prior to the date of termination hereof, shall continue to remain in force. Such notice on the part of the Railroad Company may be given, at its option, by posting it upon or near said track, and this agreement in such case shall terminate thirty (30) days after such posting. Within thirty days after the termination as aforesaid of this agreement either party may remove from the premises of the other all property belonging to it under this agreement and all property not so removed from the premises of the other within that time shall belong to the party upon whose premises the property remains.

Ninth. The provisions hereof shall apply to and govern all changes in grade or location which may be made in said track and all extensions or additions thereto.

The certain agreement dated November 27, 1916, between The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (predecessor to the Railroad Company), as first party, and the

673 (Sheet 12 of 12 sheets.)

Industry as second party, and relating to certain sidetracks at Cleveland, Ohio, shall be and the same hereby is terminated. (35726.)

Tenth. This agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors, and assigns of the parties hereto, except that the Industry shall not assign this contract or any rights hereunder without first obtaining the written consent of the Railroad Company.

In witness whereof, the parties hereto have duly executed this agreement in duplicate the day and year first above written.

THE NEW YORK CENTRAL RAILROAD COMPANY,
By R. THWAITES, *Asst. General Manager.* [LS]
THEURER-NORTON PROVISION COMPANY,
By M. C. TEUFD, *Pres.* [LS].

Form Approved:
W. N. KING.
Description approved:
R. C. ROTE.
Terms and conditions approved:
H. W. F.
C. M. WILLIAMS.

674 *Exhibit No. 28*

(Registry No. 37978)

(Sheet 1 of 13 sheets.)

Exhibit contains: Side Track Agreement, dated May 14, 1934, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, Theurer-Norton Provision Company, and Swift & Company.

Supplemental Agreement dated February 19, 1935, between the same parties.

675 (Sheet 2 of 13 sheets.)

PRIVATE SIDETRACK AGREEMENT

This Agreement made this 14th day of May 1934, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway (hereinafter called the Railroad Company), party of the first part, and Theurer-Norton Provision Company, of the City of Cleveland, County of Cuyahoga, State of Ohio (hereinafter called the Industry), party of the second part, and Swift & Company, party of the third part, witnesseth:

Whereas the Industry has applied to the Railroad Company for a sidetrack connection with the Railroad Company's line of railroad in the City of Cleveland, County of Cuyahoga, and State of Ohio,

Now therefore, in consideration of the covenants and agreements herein contained, and the mutual benefits to be derived thereunder, the parties hereto agree that the said sidetrack shall be maintained subject to the following terms and conditions:

First. The term "track" as used herein includes all track, roadbed, bridges, and other supporting structures, or appurtenances

676 (Sheet 3 of 13 sheets.)

used directly in connection therewith, shown in red and yellow colors on blueprint No. C-6333-U3, dated May 8, 1934, hereto attached and made a part of this agreement. The track shall be owned, and the cost of maintaining the same, shall be borne by the parties hereto as follows:

(a) The Industry shall, without cost to the Railroad Company, provide the necessary right-of-way for the portion of the track extending beyond the Railroad Company's premises, and procure and maintain in effect all grants, licenses, franchises, or permits necessary for the construction, maintenance, and operation of the track, in, upon, or across any public road, street, or other property

or reservation which may be traversed or intersected thereby, and assume the obligations imposed in or by reason of such grants, licenses, franchises, or permits, or hereafter imposed by law or other public authority in respect thereof including all taxes, assessments, and license fees, policing, and the erection, maintenance, and operation of any crossing gates or other warnings or protection, and indemnify and hold harmless the Railroad Company from any and all cost and expense in connection therewith.

* * * * *

(d) The Industry may, at its own expense, construct over or under said track, hoppers, pits, or other loading or unloading devices, and when constructed they shall come under the provisions of this agreement, and all the terms and conditions

677 (Sheet 4 of 13 sheets.)

thereof applying to the track shall apply with equal force to said hoppers, pits, or other loading or unloading devices except pipe lines which are covered by separate agreement.

(e) The Industry shall submit to the Railroad Company detail plans of hoppers, pits, or other loading or unloading devices, and the construction thereof shall not be commenced until said plans have been approved by the Railroad Company.

* * * * *

That part of said track lettered ABCDE colored red on said plan has heretofore been constructed and is owned and shall be maintained by the Railroad Company at its sole cost and expense.

That part of said track lettered EF colored green on said plan has heretofore been constructed and the provisions relating to the ownership and maintenance of said track are found in an agreement dated February 1, 1934, between the Railroad Compauy as first party and Swift and Company as second party.

That part of said track lettered FG colored yellow on said plan has heretofore been constructed and is owned by the Industry. The Railroad Company will maintain said track lettered FG and will bill against the Industry for the entire expense thereof, which said bills the Industry hereby agrees to pay upon presentation,

678 (Sheet 5 of 13 sheets.)

Second. No casinghead gasoline shall be handled on said track without special permission. Other volatile liquids may be handled, provided the Industry complies with the regulations contained in ARA Circulars Nos. 2084–B and ES–3, or any regulations amendatory thereof or supplemental thereto, or provides, at its own expense, such safeguards and protective devices as may be necessary to prevent the occurrence of any loss, damage, or injury by reason of the inflammable or combustible

nature of the substances handled. The Railroad Company will, if it finds the same necessary, install and maintain, at its own expense, insulated rail joints separating said track from all connecting tracks.

Third. In the event that the Railroad Company shall furnish material or labor herein undertaken to be furnished by the Industry, the Industry shall and will pay to the Railroad Company, promptly upon rendition of bills, the entire cost thereof, inclusive of the Railroad Company's usual percentage charge to cover the expense of superintendence, supervision, and use of tools, handling and storing of material, workmen's compensation and liability insurance, and accounting. Material and labor so furnished shall remain the property of the Railroad Company until such payment is made, and if such payment shall be in default beyond the period of thirty (30) days after bill is

679 (Sheet 6 of 13 sheets.)

rendered, the Railroad Company, in addition to all other remedies may discontinue all operations over and remove said tracks. The Railroad Company may, at its option, before furnishing such material or labor, require the Industry to advance to the Railroad Company the estimated cost thereof, which advance shall be adjusted to actual cost upon completion of the work.

Fourth. The Industry shall keep said track clear of obstructions, and shall not place or allow any temporary or permanent structures or obstructions of any kind within the space of eight and one-half feet on either side of the center line of said track, or within the space of twenty-one feet above the said track (being the standard clearance for structures of the Railroad Company), except as to the clearances, if any, less than standard shown upon said blueprint; provided, however, that no wire or cable line of any kind shall be placed or allowed within such further space on either side or above the said track as shall be determined by the Railroad Company in each particular case.

All clearances less than standard shown on said blueprint shall be protected by standard warning guards or signs placed in a manner and located satisfactorily to the duly authorized representative of the Railroad Company. The expense of installing and maintaining such guards or signs shall be borne by the Industry. If the structures or obstructions at said points are changed or removed, the clearance at said points shall then be

680 (Sheet 7 of 13 sheets.)

made not less than standard.

The Industry shall assume and indemnify and hold harmless the Railroad Company for and from any and all liability, loss, and expense (including Workmen's Compensation), resulting

from loss of life or damage or injury to persons or property (including employees of either of the parties hereto), arising in whole or in part by reason of or in any way resulting from the presence or maintenance of structures or obstructions encroaching upon the aforesaid standard clearances or from the presence of wire or cable lines over or adjacent to said track other than structures or obstructions, wire or cable lines belonging to the Railroad Company or its licensees.

Fifth. The Railroad Company may use the part of said track on its premises and may connect such part with other tracks, and after obtaining the specific written consent of the Industry, may use the part of said track on the premises of the Industry and may connect the same with other tracks, for the operation of its railroad or the use of third parties, provided such use or connection shall not interfere unreasonably with the use of the track, which is the subject of this agreement, for the business of the Industry. In the event of such use or connection to serve other patrons of the Railroad Company, or as a connection with other tracks owned or used by the Railroad Company, there shall be a reduction in the Industry's expense of maintenance and an adjustment of its original

681 (Sheet 8 of 13 sheets.)

outlay, as to the part of said track so used, to be determined by the character and extent of such use.

The Industry agrees not be extend such part of said track as may be on permises owned, controlled, or occupied by the Industry or to connect it with any other track, or permit the use thereof by anyone not a party hereto without first obtaining the written consent of the Railroad Company. In the event of the use thereof by anyone not a party hereto, with such written consent but without entering into a written agreement with the Railroad Company, the Industry shall be responsible for the entire maintenance of such extensions thereto or connection therewith, and shall indemnify the Railroad Company against all liability for loss of life or damage or injury to persons or property by reason of or resulting from such use by others as if the Industry were the sole user.

Sixth. The Industry assumes all responsibility for and shall indemnify and hold harmless the Railroad Company from and against loss or damage to property of the Industry or to property upon the premises of the Industry or upon said track regardless of the Railroad Company's negligence, arising from fire caused by locomotives operated by the Railroad Company for the purpose of serving said Industry, except to the premises of the Railroad Company and the rolling stock belonging to the Railroad Company or to third parties and to shipments then in the common carrier

682 (Sheet 9 of 13 sheets.)

custody of the Railroad Company.

In respect of all loss or damage to property, other than by fire caused as aforesaid, or in respect of injury to or death of persons caused by or in connection with the construction, operation, maintenance, use, presence, or removal of said track (a) the Railroad Company shall assume responsibility for and hold the Industry harmless from all losses, damages, claims, and judgments arising from or growing out of the sole actionable acts or omissions of the Railroad Company, its agents or employees; (b) the parties hereto shall equally bear all losses, damages, claims, and judgments arising from or growing out of the joint or concurring actionable acts or omissions of both parties hereto, their respective agents or employees; and (c) the Industry shall assume the responsibility for and save the Railroad Company harmless from all losses, damages, claims, and judgments arising from or growing out of the sole actionable acts or omissions of the Industry, its agents or employees.

Seventh. If at any time or times hereafter the Railroad Company makes any changes in the location or elevation of its line of railroad at the point of connection with said track, the Industry shall, at its own expense, make such changes in the portion of the track to be constructed and maintained by it as may be necessary to accommodate the changes to be made by the Railroad Company.

683 (Sheet 10 of 13 sheets.)

If the Railroad Company shall, at any time, equip its railroad for operation by electricity, the Railroad Company may install and maintain third rail or overhead trolley and other appurtenances for electrified operation on said track, and the Industry shall reimburse the Railroad Company for the cost of such installation and maintenance beyond the clearance point.

Eighth. This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect, except that whatever liability may have accrued to either party as against the other, prior to the date of termination hereof, shall continue to remain in force. Such notice on the part of the Railroad Company may be given, at its option, by posting it upon or near said track, and this agreement in such case shall terminate thirty (30) days after such posting. Within thirty days after the termination as aforesaid of this agreement either party may remove from the premises of the other all property belonging to it under this agreement and all property not so removed from the premises of the other within that time shall belong to the party upon whose premises the property remains.

Ninth. The provisions hereof shall apply to and govern all changes in grade or location which may be made in said track and all extensions or additions thereto.

The certain agreement dated March 15, 1917, between The Cleveland, Cincinnati, Chicago and St. Louis Railway Company
684 (Sheet 11 of 13 sheets.)
(predecessor to the Railroad Company), as first party, the Industry as second party, and Swift & Company as third party, and relating to said track, shall be and the same hereby is terminated. (35683.)

Tenth. This agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors, and assigns of the parties hereto, except that the Industry shall not assign this contract or any rights hereunder without first obtaining written consent of the Railroad Company.

In witness whereof, the parties hereto have duly executed this agreement in triplicate the day and year first above written.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinati, Chicago and St. Louis Railway.
By E. THWAITES, *Asst. General Manager.* [LS]
THEURER-NORTON PROVISION COMPANY,
By W. C. TAUPAL, *Pres.* [LS]
Form approved:
W. N. KING.
Description approved:
R. O. ROTE.
Terms and conditions approved:
H. W. F.
C. M. WILLIAMS.

Swift & Company, owner of the track lettered EF colored green on said plan, hereby agrees that the Railroad Company may use said track lettered EF at any time for the operation of its railroad or for other parties, provided such use shall not interfere unreasonably with the use of said track for the business of Swift & Company.

SWIFT & COMPANY,
By JOHN HOLMES, *Vice President.* [LS]
Approved as to form:
SWIFT AND COMPANY,
W. H. SUTTER, *Asst. Secretary.*
E. B. K. V. M. S.
W. A. M. R.
E. W. P.
G. W. C.

685 (Sheet 12 of 13 sheets.)

CLEVELAND, OHIO, *February 19, 1935.*

By Mutual Consent of the Parties, the second-last typewritten paragraph on the bottom of the first page of the agreement dated May 14, 1934, between The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, as first party, Theurer-Norton Provision Company as second party, and Swift & Company as third party, and which agreement relates to a side track at Cleveland, Ohio, shall be and the same hereby is modified and amended to read as follows:

That part of said track lettered EF colored green on said plan has heretofore been constructed and the provisions relating to the ownership and maintenance of said track are found in an agreement dated November 25, 1916, between The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (predecessor to the Railroad Company), as first party, and Swift and Company as second party.

This supplemental agreement shall be attached to, become a part of, and terminate with the aforesaid agreement between the parties hereto dated May 14, 1934.

In witness whereof, the parties hereto have executed this supplemental agreement in triplicate by their duly authorized and proper officers as of the day and year first above

686 (Sheet 13 of 13 Sheets.)

written.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By E. THWAITES, *Asst. General Manager.*

Approved as to form:
W. N. KING, *General Attorney,*
New York Central R. R. Co.
C. M. WILLIAMS,
C. M. W.

THEURER-NORTON PROVISION COMPANY,
By AUG. F. LUCHT, *Secy.*
SWIFT & COMPANY,
By D. W. CREEDEN, *Vice President.*

E. B. K.
G. M. C.
W. A. M. A.

687 *Exhibit No. 29*

(Sheet 1 of 3 sheets.)

ORDINANCE No. 18748-A

An Ordinance granting to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors and assigns, the right to lay a switch track across West 65th Street.

SECTION 1. Be it ordained by the Council of the City of Cleveland, State of Ohio, that permission, on the conditions hereinafter mentioned, is hereby given to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors and assigns to lay a switch track across West 65th Street, as shown on a plat attached hereto and marked "Exhibit A" from said Company's tracks on a 16° curve which intersects the center line of said West 65th Street at a point 1,390 ft. south of the intersection of said center line of West 65th Street with the center line of Stock Street as shown by yellow lines on the plat, which plat is referred to herein and is attached to the original copy of this Ordinance.

SECTION 2. That such switch track shall have no frogs or switch points within the limits of the street and shall be laid to the grade of said West 65th Street as now established and paved, and shall be relaid to such grades as may hereafter be established, and shall be planted between the rails and 18 inches outside of each rail; the water from the gutters of said street shall be conveyed under said track in a proper and acceptable manner; or the necessary catch basins shall be constructed and connected with the sewer in said West

688 (Sheet 2 of 3 sheets.)

65th Street, as the City Engineer shall direct, at the expense of said Railroad Company and paving displaced shall be relaid outside of track and at the expense of said Railroad Company, and said tracks, gutters and planking shall be kept in constant good repair, and the track properly lighted by or at the expense of said Railroad Company, its successors or assigns, as the Board of Public Service of the City of Cleveland may direct, and to the acceptance of said Board. Said Company shall build, maintain a fence along said track on West 63rd Street satisfactory to the direction of Public Service.

SECTION 3. That the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors or assigns, hereby obligates itself to at any and all times hold the City harmless from any damage to persons or property or expense of any kind that may arise by reason of said switch track or the permission herein granted; to at all times fully obey any general or special regula-

tions that may now or hereafter be enacted governing or applicable to the said switch track, to waive any and all rights to the contrary and will support or remove said track as may be ordered by the Board of Public Service when necessary for the purpose of making any general improvements in said West 65th Street and at no time to stand cars upon any portion of said West 65th Street or allow the same to be done.

689 (Sheet 3 of 3 sheets.)

SECTION 4. That the Council reserves the right to at any and all times revoke this permission and that whenever so revoked the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company agree to remove the track from said West 65th Street and return the street and pavement to the condition required by the Board of Public Service within 30 days after receiving notice of the revocation of this grant; and in case it shall not so remove the same and repair the pavement properly, then the Board of Public Service may cause same to be done at the expense of said Company, its successors or assigns.

SECTION 5. That this Ordinance shall take effect and be in force from and after the earliest period allowed by law, and the filing with the City Clerk of a written acceptance of the terms and conditions hereof by said Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the payment to the City Auditor the expense of printing and advertising the same.

H. F. WALKER, *Pres. of Council.*
P. Y. M'CRAY, *City Clerk.*

Passed Sept. 6, 1910.
Approved by Mayor Sept. 8, 1910.

690 *Exhibit No. 30*

(Sheet 1 of 12 sheets.)

Exhibit contains the following easements:

The Blumenstock & Reid Co. to The C. C. C. & St. L. Ry. Co.

Henry C. Thom et al. to The C. C. C. & St. L. Ry. Co.

Theurer Norton Provision Co. et al. to The C. C. C. & St. L. Ry. Co.

Henry C. Thom et al. to The C. C. C. & St. L. Ry. Co.

The Cleveland Union Stock Yards Company to The C. C. C. & St. L. Ry. Co.

H. C. Thom, et al. to C. C. C. & St. L. Ry. Co.

granting the 16-foot easement required in order to reach and serve the predecessors of present Swift & Company plant located easterly of West 65th Street and westerly of West 63rd Street.

691 (Sheet 2 of 12 sheets.)

THE BLUMENSTOCK & REID CO. TO THE C. C. C. & ST. L. RY. CO.

Easement, Dec. 5, 1911, Vol. 1364, Page 635

This Indenture witnesseth, that The Blumenstock & Reid Co., a Corporation, the grantor, in consideration of the benefits accruing to it by reason thereof, does for itself, its successors and assigns, to the extent of its ownership in the property hereinafter described, grant unto The C. C. C. & St. L. Ry. Co. a corporation, the grantee, its successors and assigns, an easement for the construction, operation, and maintenance of a railroad track over the following described real estate in Cuyahoga County, in the State of Ohio, to wit:

Being parts of Lots 255 and 256, and 257, of Julia A. Sargent's Allotment of part of Original Lot 34, in the City of Cleveland, Brooklyn Township, Cuyahoga County, Ohio, and being more particularly described as follows:

A strip of ground 16 feet in width and extending from the south line of Lot 255 to the north line of Lot 257 and being 8 feet on each side of the following-described center line; from the intersection of the southeast line of Stock St. SW. with the east line of 65th St. SW. measure southwardly 1,349.6 feet along the east line of 65th St. SW.; to a point where said center line produced, intersects the last named street line; thence deflecting 122°20′ to the left, measure northeastwardly 167 feet; thence tangent thereto along a curve to the left (the radius of which curve is 301.64 feet) measure northeastwardly 18′ to a point where said

692 (Sheet 3 of 12 sheets.)

Center line intersects the south line of said lot 255 for the place of beginning; thence continuing along said curve measure 122.4 feet; containing 0.025 of an acre more or less.

To Have and To Hold the said easement in said land unto The C. C. C. & St. L. Ry. Co. its successors and assigns, for construction, maintenance, and operation of said railroad track. The easement herein granted shall terminate whenever said Railway Company, its successors and assigns, shall cease to use said land for the purposes therein set forth.

In witness whereof, the said The Blumenstock & Reid Co. has caused its corporate name and seal to be hereunto affixed by its President and the same to be attested by its Secretary, this 5th day of December 1911.

THE BLUMENSTOCK & REID CO.

By (Signed) GEORGE BLUMENSTOCK, *Pres.*

Attest:

(Signed) THOMAS REID, *Sec.*

693 (Sheet 4 of 12 Sheets.)

HENRY C. THOM ET AL. TO THE C. C. C. & ST. L. RY. CO.

Easement, March 19, 1908, Vol. 1144, Page 534

We, Henry C. Thom and Julia G. Thom, his wife, in consideration of the benefits and privileges accruing to us by reason thereof, do each severally for ourselves, our heirs and assigns, to the extent of the ownership of us or either of us in the property hereinafter described, hereby grant unto The C. C. C. & St. L. Ry. Co., its successors and assigns, an easement for the construction, operation and maintenance of a railroad track in and over the following described property, to wit:

Being a strip of land 16 feet in width, off the easterly side of sublots Nos. 285 to 255, inclusive, of Julia A. Sargent's Allotment of part of Original Brooklyn Township Lot No. 34, as recorded in Vol. 23, page 26 of the Records of Maps of Cuyahoga County, Ohio, and also for the construction, maintenance, and operation of a track upon and over the street upon which said lots abut.

To Have and To Hold, the said easement in said lands unto the said The C. C. C. & St. L. Ry. Co., its successors and assigns, for the construction, maintenance, and operation of said railroad tracks, the easement herein granted, however shall terminate whenever said grantee, its successors and assigns, shall cease to use said lands for the purposes herein set forth.

In Witness Whereof the grantors herein have hereunto set their

694 (Sheet 5 of 12 Sheets.)

hands and seals this 19th day of March 1908.

Signed, Sealed and Acknowledged in presence of:

(Signed) HENRY C. THOM.
(Signed) JULIA G. THOM.

ISABELLA O. BEATTY.
JOHN T. BRADY.

695 (Sheet 6 of 12 Sheets.)

THEURER NORTON PROVISION CO. ET AL. TO THE C. C. C. & ST. L. RY. CO.

Easement, March 18, 1908, Vol. 1135, Page 435

We, The Theurer Norton Provision Co., a corporation, C. A. Bressler and Mrs. C. A. Bressler, his wife, J. B. Foster and Mary B. Foster, his wife, The Retail Butchers Protective Association Company, William Bennett, John H. Bennett, and William J. Bennett, Partners, doing business under the firm name of Bennett

& Sons, Ernest H. Hughes and Lillian A. Hughes, his wife, and the Blumenstock & Reid Co., in consideration of the benefits and privileges accruing to us by reason thereof, do each severally for ourselves, and our heirs and assigns, to the extent of the ownership of each in the property hereinafter described, hereby grant unto the C. C. C. & St. L. Ry. Co., its successors and assigns, an easement for the construction, operation, and maintenance of a railroad track in, on and over the following-described property, to wit:

Being a strip of land 16 feet in width off the easterly side of sublots Nos. 285 to 255, inclusive, of Julia A. Sargent's Allotment of Part of Original Brooklyn Township Lot No. 34, as recorded in Vol. 23 on page No. 26 of the Records of Maps of Cuyahoga County, Ohio, and also for the construction maintenance and operation of a track upon and over the street upon which said lots abut.

To Have and To Hold the said easement in said lands unto the said The C. C. C. & St. L. Ry. Co., its successors and assigns, for the construction, maintenance and operation of said railroad track. The easement herein granted however shall terminate whenever

696 (Sheet 7 or 12 Sheets.)

said grantee, its successors and assigns, shall cease to use said land for the purposes herein set forth.

In witness whereof the grantors herein, the corporation by their proper officers, thereunto duly authorized, have hereto set their hands and seals, the 18th day of March, 1908.

THE THEURER NORTON PROVISION CO. ET AL.

697 (Sheet 8 of 12 Sheets.)

HENRY C. THOM ET AL. TO THE C. C. C. & ST. L. RY. CO.

Easement, June 7, 1911, Vol. 1340, Page 431

This Indenture witnesseth, that Henry C. Thom and Julia G. Thom, husband and wife, of Cook County in the State of Illinois, grantors, in consideration of the benefits accruing to them by reason thereof, do for themselves, their heirs and assigns, to the extent of their ownership in the property hereinafter described, hereby grant unto The C. C. C. & St. L. Ry. Co. a corporation existing under and by virtue of the laws of the States of Ohio and Indiana, Grantee, its successors and assigns, an easement for the construction, operation, and maintenance of a railroad track in and over the following described real estate in Cuyahoga County in the State of Ohio, to wit:

Being parts of Lots 164, 165, 251, 252, 253, 254, of Julia A. Sargent's Allotment of part of Original Lot 34, in the City of

Cleveland, Brooklyn Township, Cuyahoga County, Ohio, and being more particularly described as follows:

A strip of ground 16 feet in width and extending from the south line of Lot 165 northeastwardly to the north line of Lot 254, and being 8 feet on each side of the following described center line; from the intersection of the southeast line of Stock St. SW. with the east line of 65th St. SW. measure southwardly 1,349.6 feet along said east line of 65th St. SW. to a point where said center line produced intersects the last mentioned street line; thence deflecting 122° 20′ to the left measure northeastwardly 64 feet along said center line produced to a point in the south line of said Lot 165 for the place of beginning; thence continuing along the last described course measure 135 feet; thence tangent thereto along a curve to the left (the radius of which curve is 301.64 feet) measure northeastwardly 181 feet to a point where said center line intersects the north line of said Lot 254; containing an area of 0.12 of an acre more or less.

698 (Sheet 9 of 12 sheets.)

And the Grantors hereby assign to said grantee, its successors and assigns, all right and privilege which they, the said grantors, may have by virtue of a certain deed dated — day of October 1910, from Nadine J. Pope and Horace Heber Simmons, to the said grantors, to maintain a switch track over all other subolts in Julia A. Sargent's Allotment of Original Brooklyn Township Lot 34, which was devised by Julia A. Sargent to Nadine J. Pope and Horace Heber Simmons.

To Have and To Hold the same easement in said land unto The C. C. C. & St. L. Ry. Co., its successors and assigns, for the construction, maintenance, and operation of said railroad track; the said easement herein granted however shall terminate whenever said Railway Co., its successors and assigns, shall cease to use said land for the purposes herein set forth. This deed is made for the purpose of correcting description in land in deed from the grantors herein to the grantee herein, dated January 16, 1911, and recorded January 28, 1911, in Vol. 1300, Page 188, of the Records of Cuyahoga Co., Ohio.

In witness whereof the said Henry C. Thom and Julia G. Thom, have hereunto set their hand this 7th day of June, 1911.

(Signed) HENRY C. THOM.
(Signed) JULIA G. THOM.

Signed and Acknowledged in presence of:
R. D. BROWN.
R. E. FISHER.

699 (Sheet 10 of 12 sheets.)

This Indenture witnesseth, that The Cleveland Union Stock Yards Company, a corporation, Grantor, in consideration

of the mutual benefits accruing to it and to The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company by reason thereof, does for itself, its successors and assigns to the extent of its ownership in the property hereinafter described, hereby grant unto The Cleveland Cincinnati Chicago and Saint Louis Railway Company, a corporation Grantee its successors and assigns, an easement for the construction, operation, and maintenance of a railroad track in and over the following described real estate in Cuyahoga County in the State of Ohio, to wit:

Being a part of Lot 166 of Julia A. Sargent's Allotment of part of Original Lot 34 in the City of Cleveland, Brooklyn Township, Cuyahoga County, Ohio, and being more particularly described as follows:

A strip of ground 16 feet in width and extending from the east line of 65th Street SW. northeasterly to the north line of said Lot 166 and being 8 feet on each side of the following described center line:

From the intersection of the southeast line of Stock Street SW., with the east line of 65th Street SW., measure southwardly 1,349.6 feet along said east line of 65th Street SW., to a point where said center line intersects the last-named street line for the place of beginning;

Thence deflecting 122°20′ to the left measure northeastwardly 64 feet to the point where said center line intersects the north line of said Lot 166; Containing 1,024 square feet more or less.

It is understood however that in the event a connection between the Prim Street track and the main tracks of said Railway Company is made at or near Clark Avenue said Grantor reserves the privilege of having the connection switch between the Prim Street track and the Stock Yards track removed.

700 (Sheet 11 of 12 Sheets.)

To have and to hold the said easement in said land unto The Cleveland Cincinnati Chicago and Saint Louis Railway Company, its successors and assigns, for the construction, maintenance, and operation of said railroad track. The easement herein granted however, shall terminate whenever said Railway Company, its successors and assigns, shall cease to use the said land for the purposes herein set forth.

In witness whereof, the said The Cleveland Union Stock Yards Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 11th day of May A. D. 1911.

THE CLEVELAND UNION STOCK YARDS COMPANY,

By (Signed) JOHN F. WHITLAW, *Pres.*

Attest:

(Signed) ALLEN S. WALTZ, *Sec.*

(Sheet 12 of 12 Sheets.)

H. C. THOM, ET AL. TO C. C. C. & ST. L. RY. CO.

January 28, 1911, Vol. 1300, Page 182

Know all men by these presents:

That we, H. C. Thom and J. G. Thom, husband and wife, for and in consideration of the sum of $1.00 to us paid by the C. C. C. & St. L. Ry. Co., receipt of which is acknowledged, do hereby grant unto said The C. C. C. & St. L. Ry. Co., its successors and assigns, a 16-foot right-of-way for a switch track as now laid across sublots Nos. 163, 164, 165, 252, 253, and 254 in Julia A. Sargent's Allotment of part of original Brooklyn Township Lot No. 54, as shown by the recorded plant in Vol. 23 of maps, page 26 of Cuyahoga County Records, State of Ohio.

And said Grantors hereby assign to said Grantee, its successors and assigns, all right and privilege which they, the said Grantors, may have by virtue of a certain deed dated the — day of October 1910 from Nadine J. Pope and Harace H. Simmons to the said Grantors to maintain a switch track over all other sublots in Julia A. Sargent's Allotment of part of Original Brooklyn Township Lot No. 34, which were devised by Julia A. Sargent to Nadine J. Pope and Harace H. Simmons.

In witness whereof we have hereunto set our hands this 16th day of January A. D. 1911.

H. C. THOM.
J. G. THOM.

701

Exhibit No. 31

THE CLEVELAND UNION STOCK YARDS CO.

CLEVELAND, OHIO

DECEMBER 31ST, 1934.

A. Z. Baker, President & Gen. Mgr.
P. H. Coad, Sec'y. & Treas.

Mr. C. M. WILLIAMS,
Supt., The New York Central R. R. Co.,
Cleveland Union Terminal, Cleveland, Ohio.

DEAR SIR: Refer to your letter of December 26th, 1934, replying to our letters of November 21st and December 19th regarding the use of tracks owned by this Company for handling traffic to other industries, especially traffic competitive with the business of this Company.

It is noted that the matter is being given consideration and that you will advise us what, if anything, you may be able to do. You do not give any indication of the time when such advice can be

expected, and you express some doubt as to whether anything can be done.

The agreement entered into by The Clevland, Cincinnati, Chicago & St. Louis Railway Company and The Cleveland Union Stock Yards Company, dated June 16th, 1924, relating to use of side tracks, provides in paragraph "Fourth" that the railroad shall have the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land. It is our purpose to limit the free use of these tracks to traffic not competitive with the business of this Company. Competitive traffic includes, certainly, livestock and probably in-bound movement of meat.

Paragraph "Sixth" of the agreement of June 16th, 1924, provides that the agreement shall terminate thirty days after written notice by either party to the other to that effect. This letter is the notice required.

After the termination of thirty days, on any livestock handled direct to the unloading chutes of slaughterers in Cleveland over the tracks and/or land of this Company, we will charge and expect you to pay us the charge named in our tariff No. 5 applicable to livestock consigned direct to packers and not offered for sale, which charge is at present

702 20¢ per head on cattle, 12½¢ per head on calves, 7½¢ per head on hogs, and 5¢ per head on sheep.

Pending the execution of a new agreement, all provisions of the agreement of June 16th, 1924, except those relating to the free use for competitive traffic may continue.

Yours very truly,

THE CLEVELAND UNION STOCK YARDS CO.,

(Sgd.) A. Z. BAKER,

President & General Manager.

AZB:W.

703 *Exhibit No. 32*

THE CLEVELAND UNION STOCK YARDS CO.

CLEVELAND, OHIO

JANUARY 11, 1934.

MR. C. M. WILLIAMS,

Supt., New York Central Lines,

Terminal Tower, Cleveland, Ohio.

DEAR SIR: For some time we have been permitting the free use of certain of our facilities in making deliveries of shipments consigned to packing concerns in the stockyards district. We find it necessary now to limit the free use to business or shipments not

competitive with the business of the Cleveland Union Stock Yards Company.

Consequently, beginning February 1st, 1935, we will apply the charges stated in Exception (3) Item 1, Cleveland Union Stock Yards Co. Tariff No. 5, a copy of which is enclosed.

The charges will be assessed against the line haul carrier and will be assessed regardless of whether unloaded at stockyards unloading chutes or at the chutes of the following companies: The Cleveland Provision Co., The Federal Packing Co., The Hughes Provision Co., Koblenzer Bros., Kreinberg & Krasny, Swift & Company, The Theurer-Norton Provision Co.

Bills will be rendered monthly.

This in no way affects the delivery of noncompetitive freight over or by means of our property.

If you desire it the livestock will be weighed and the weights furnished you for freight purposes.

Yours very truly,

THE CLEVELAND UNION STOCK YARDS CO.,

By (Sgd.) A. Z. BAKER,

President and General Manager.

A. Z. B.—W.

Same letter to all Cleveland Roads.

Exhibit No. 33

704 (Sheet 1 of 2 sheets.)

THE NEW YORK CENTRAL RAILROAD COMPANY

CLEVELAND,

F. S. Risley, Assistant Vice President & General Manager.

OCTOBER 6th, 1938.

THE STANDARD BEEF COMPANY, *Cleveland, Ohio.*

GENTLEMEN: Referring to the certain agreement between you and The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, dated March 17th, 1938, covering a side track at Cleveland, Ohio, as shown on plan No. C-7040-K3 attached to said agreement and made a part thereof:

As you are aware it is necessary in order to reach the track covered by the aforesaid agreement for the Railroad Company to operate over a track which is located on the westerly side of West 65th Street and owned by The Cleveland Union Stock Yards Company.

This is to notify you that the Railroad Company is unable to make satisfactory arrangements with The Cleveland Union Stock Yards Company to permit it to handle livestock over the track

owned by the Stock Yards Company. We are, however, permitted to handle dead freight, that is to say, any commodity other than livestock, upon and over said track for your accommodation.

This notice is addressed to you for the purpose of
705 (Sheet 2 of 2 sheets.)
advising you of the situation and we are asking you to endorse your acceptance on one copy of this letter, returning the same to us, which will constitute a modification of the aforesaid agreement and will relieve the Railroad Company from handling livestock over said track to your plant.

THE NEW YORK CENTRAL RAILROAD COMPANY
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By (Sgd.) F. S. RISLEY,
Asst. Vice Pres. & Gen. Mgr.

CLEVELAND, OHIO, *October 15, 1938.*

The undersigned consents to a modification of the above-mentioned agreement and relieves the Railroad Company from any obligation to deliver livestock at its plant over the track above referred to.

THE STANDARD BEEF COMPANY,
By (Sgd.) A. M. BALTDRINIC.

706 *Exhibit No. 34*

(Sheet 1 of 10 Sheets.)

OCTOBER 6th, 1938.

Mr. KALLEN KREINBERG AND WILLIAM A. KRESNY,
Co-partners doing business as Kreinberg and Kresny, Cleveland, Ohio.

GENTLEMEN: Referring to the certain agreement between you and The Cleveland, Cincinnati, Chicago and St. Louis Railway, predecessor to The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, dated August 1st, 1927, covering a side track at Cleveland, Ohio, as shown on plan dated July 1st, 1927, attached to said agreement and made a part thereof:

As you are aware it is necessary in order to reach the track covered by the aforesaid agreement for the Railroad Company to operate over a track which is located on the westerly side of West 65th Street and owned by The Cleveland Union Stock Yards Company.

This is to notify you that the Railroad Company is unable to

make satisfactory arrangements with The Cleveland Union Stock Yards Company to permit it to handle livestock over the track owned by the Stock Yards Company. We are, however, permitted to handle dead freight, that is to say, any commodity other than livestock, upon and over said track for your accommodation.

This notice is addressed to you for the purpose of advising you of the situation and we are asking you to endorse your acceptance on one copy of this letter, returning the same to us, which will constitute a modification of the aforesaid

707 (Sheet 2 of 2 sheets.)

agreement and will relieve the Railroad Company from handling livestock over said track to your plant.

The New York Central Railroad Company,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By ——— ———,
Asst. Vice Pres. and Gen. Mgr.

Cleveland, Ohio, ---- 1935.

The undersigned consents to a modification of the above mentioned agreement and relieves the Railroad Company from any obligation to deliver livestock at its plant over the track above referred to.

———— ————,
Copartners doing business as Kreinberg and Kresny.

708 *Exhibit No. 35*

(Sheet 1 of 2 sheets.)

The New York Central Railroad Company
CLEVELAND

October 6th, 1938.

F. S. Risley, Assistant Vice President & General Manager.
Earl C. Gibbs, Inc., *Cleveland, Ohio.*

Gentlemen: Referring to the certain agreement between you and The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, dated October 1st, 1937, covering sidetracks at Cleveland, Ohio, as shown on plan No. C-6959-K3 attached to said agreement and made a part thereof:

As you are aware it is necessary in order to reach the track covered by the aforesaid agreement for the Railroad Company to operate over a track which is located on the westerly side of West

65th Street and owned by The Cleveland Union Stock Yards Company.

This is to notify you that the Railroad Company is unable to make satisfactory arrangements with The Cleveland Union Stock Yards Company to permit it to handle livestock over the track owned by the Stock Yards Company. We are, however, permitted to handle dead freight, that is to say, any commodity other than livestock, upon and over said track for your accommodation.

This notice is addressed to you for the purpose of advising you of the situation and we are asking you to endorse

709 (Sheet 2 of 2 sheets.)

your acceptance on one copy of this letter, returning the same to us, which will constitute a modification of the aforesaid agreement and will relieve the Railroad Company from handling livestock over said tracks to your plant.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By (Sgd.) F. S. RISLEY,
Asst. Vice Pres. & Gen. Mgr.

CLEVELAND, OHIO, ———, 1938.

The undersigned consents to a modification of the above mentioned agreement and relieves the Railroad Company from any obligation to deliver livestock at its plant over the tracks above referred to.

EARL C. GIBBS, INC.,
By (Sgd.) EARL C. GIBBS, *Pres.*

710 *Exhibit No. 36*

(Sheet 1 of 2 sheets.)

OCTOBER 6TH, 1938.

SWIFT & COMPANY, *Cleveland, Ohio.*

GENTLEMEN: Referring to the certain agreement between The Federal Packing Company, predecessor to Swift & Company, and The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, dated November 24th, 1930, covering a side track at Cleveland, Ohio, as shown on plan dated November 18th, 1930, attached to said agreement and made a part thereof:

As you are aware it is necessary in order to reach the track covered by the aforesaid agreement for the Railroad Company to operate over a track which is located on the westerly side of West

35th Street and owned by The Cleveland Union Stock Yards Company.

This is to notify you that the Railroad Company is unable to make satisfactory arrangements with The Cleveland Union Stock Yards Company to permit it to handle livestock over the track owned by the Stock Yards Company. We are, however, permitted to handle dead freight, that is to say, any commodity other than livestock, upon and over said track for your accommodation.

This notice is addressed to you for the purpose of advising you of the situation and we are asking you to endorse your acceptance on one copy of this letter, returning the same

711 (Sheet 2 of 2 sheets.)

to us, which will constitute a modification of the aforesaid agreement and will relieve the Railroad Company from handling livestock over said track to your plant.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessees of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By (Sgd.) F. R. RISLEY (stamped),
Asst. Vice Pres. & Gen. Mgr. 10/7.

CLEVELAND, OHIO, ———, 1938.

The undersigned consents to a modification of the above-mentioned agreement and relieves the Railroad Company from any obligation to deliver livestock at its plant over the track above referred to.

SWIFT & COMPANY.

By ——— ———.

712 *Exhibit No. 37*

NOVEMBER 22, 1938.
D—hgb.

SWIFT & COMPANY,
3237 W. 65th St., Cleveland, Ohio.

GENTLEMEN: In accordance with suggestion of our Mr. B. R. Brenan, am enclosing duplicate of our letter of October 6th, and would appreciate it if you will approve one copy and return for our file.

Yours very truly,

(Stamped) (Sgd.) F. S. RISLEY.
Asst. Vice Pres. & Gen. Mgr.

11/22.
Enc.
B—cy—Mr. B. R. Brenan.

713 *Exhibit No. 38*

SWIFT & COMPANY
Union Stock Yards
CLEVELAND, OHIO.

DECEMBER 2, 1938.
File 681.

MR. F. S. RISLEY,
Asst. Vice President, New York Central Railroad,
3rd and St. Clair Avenue, Cleveland, Ohio.

DEAR SIR: Referring to your letters of October 6 and November 22.

We have received a reply from Chicago in which they state they have no objection whatever to acknowledging the two letters which you sent us, but they do think that they should have some protection in the way of a written understanding that in the event of a strike, or anything else, that will prevent delivery of livestock through the Cleveland Stock Yards facilities, we can use this track for direct deliveries.

We shall be obliged if you will let us have a letter to this effect and we will immediately send it to Chicago and arrange for acknowledgement of your letter of October 6.

Yours respectfully,

SWIFT & COMPANY.
Per J. H. H.

Trans. Dept.
JHH:E
cc—Mr. E. F Burges, G. A., New York Central Railroad, 1119 Terminal Tower, Cleveland, Ohio.

714 *Exhibit No. 39*

JANUARY 6, 1939.
K—kb.

SWIFT & COMPANY,
3237 W. 65th St., Cleveland, Ohio.

GENTLEMEN: Referring to your letter of December 2, 1933, in which you refer to our letters to you of October 6th and November 22nd, respectively, relating to discontinuance of delivery of livestock over track owned by The Cleveland Union Stock Yards Company, and quote the substance of a letter to you from your Chicago office:

You must realize that the New York Central is not discontinuing the service referred to in its letters of October 6th and November 22nd because of a desire on its part to do so, but only because the price demanded by the Stock Yards Company for serv-

e over its sidetrack was so high that this Company could not fford to use the track and pay the price demanded.

Under the circumstances, you will also realize that the New York Central could not undertake to insure service over this track n case of a strike at the Stock Yards, unless some arrangements were made with the Stock Yards Company to permit the service upon a fair basis.

It occurs to us that your company might be better able to arrange for service over the Stock Yards track than the New York Central has been able to do.

Yours very truly,

(Sgd.) F. S. RISLEY (Stamped).

1/7.
B—cy—Messrs. W. N. King, F. O. Stafford, G. H. Jedele.

715

Exhibit No. 40

SWIFT & COMPANY
Union Stock Yards
CLEVELAND, OHIO

JANUARY 30, 1939.

Mr. F. S. RISLEY,
Ass't Vice President, New York Central Railroad,
3rd and St. Clair Avenue, Cleveland, Ohio.

DEAR SIR: We have been somewhat delayed in replying to your letter of January 6, with reference to your suggested change in our present agreement covering the track on the westerly side of West 65th Street and owned by the Cleveland Union Stock Yards Company, as we wished to make a thorough check of the situation. Since doing this, we find no logical reason for changing our agreement.

We find that you are not making any deliveries of livestock over this track and have not been for a good many months. Also, in the event of a strike, fire, or any other condition that should tie up the Stock Yards, we will naturally expect you to make direct deliveries of livestock to our plant over this track, which is the only track available for such purposes, and it is our understanding that you must provide proper delivery facilities for any consignee of livestock.

In any event, we cannot see why you wish to change this agreement, as you are not using this track for the delivery of livestock.

Yours respectfully,

SWIFT & COMPANY.
Per J. H. H.

Trans. Dept.
J. H. H.: E.

716 *Exhibit No. 41*

OCTOBER 6TH, 1938.

THE HUGHES PROVISION COMPANY,
Cleveland, Ohio.

GENTLEMEN: Referring to the certain agreement between you and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, predecessor to The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, dated March 28th, 1927, covering a sidetrack at Cleveland, Ohio, as shown on plan dated March 18th, 1927, attached to said agreement and made a part thereof:

As you are aware it is necessary in order to reach the track covered by the aforesaid agreement for the Railroad Company to operate over a track which is located on the westerly side of West 65th Street and owned by The Cleveland Union Stock Yards Company.

This is to notify you that the Railroad Company is unable to make satisfactory arrangements with The Cleveland Union Stock Yards Company to permit it to handle livestock over the track owned by the Stock Yards Company. We are, however, permitted to handle dead freight, that is to say, any commodity other than livestock, upon and over said track for your accommodation.

This notice is addressed to you for the purpose of advising you of the situation and we are asking you to endorse
717 your acceptance on one copy of this letter, returning the same to us, which will constitute a modification of the aforesaid agreement and will relieve the Railroad Company from handling livestock over said track to your plant.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By ——— ———,
Asst. Vice Pres. & Gen. Mgr.

CLEVELAND, OHIO, ———, 1938.

The undersigned consents to a modification of the above mentioned agreement and relieves the Railroad Company from any obligation to deliver livestock at its plant over the track above referred to.

THE HUGHES PROVISION COMPANY.

By ——— ———

718 *Exhibit No. 42*

OCTOBER 6th, 1938.

CHRISTIAN KOBLENZER AND MATTHIAS KOBLENZER,
Copartners doing business as Koblenzer Brothers,
Cleveland, Ohio.

GENTLEMEN: Referring to the certain agreement between you and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, predecessor to The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, dated August 1st, 1922, covering a side track at Cleveland, Ohio, as shown on plan dated July 20th, 1923, attached to said agreement and made a part thereof:

As you are aware it is necessary in order to reach the track covered by the aforesaid agreement for the Railroad Company to operate over a track which is located on the westerly side of West 65th Street and owned by The Cleveland Union Stock Yards Company.

This is to notify you that the Railroad Company is unable to make satisfactory arrangements with The Cleveland Union Stock Yards Company to permit it to handle livestock over the track owned by the Stock Yards Company. We are, however, permitted to handle dead freight, that is to say, any commodity other than livestock, upon and over said track for your accommodation.

This notice is addressed to you for the purpose of advising you of the situation and we are asking you to endorse your acceptance on one copy of this letter, returning the same to us, which
719 will constitute a modification of the aforesaid agreement and will relieve the Railroad Company from handling livestock over said track to your plant.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By (Sgd.) F. S. RISLEY
Asst. Vice Pres. & Gen. Mgr.

CLEVELAND, OHIO, *Nov. 18, 1938*

The undersigned consents to a modification of the above-mentioned agreement and relieves the Railroad Company from any obligation to deliver livestock at its plant over the tracks above referred to.

(Sgd.) CHRIST. KOBLENZER,
Copartners doing business as Koblenzer Brothers.

720 *Exhibit No. 43*

OCTOBER 6TH, 1938.

THEURER-NORTON PROVISION COMPANY AND SWIFT & COMPANY,
Cleveland, Ohio.

GENTLEMEN: Referring to the certain agreement between your companies and The New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, dated May 14th, 1934, covering a side track at Cleveland, Ohio, as shown on plan No. C–6332–U3 attached to said agreement and made a part thereof:

As you are aware it is necessary in order to reach the track covered by the aforesaid agreement for the Railroad Company to operate over a track which is located on the westerly side of West 65th Street and owned by The Cleveland Union Stock Yards Company.

This is to notify you that the Railroad Company is unable to make satisfactory arrangements with The Cleveland Union Stock Yards Company to permit it to handle livestock over the track owned by the Stock Yards Company. We are, however, permitted to handle dead freight, that is to say, any commodity other than livestock, upon and over said track for your accommodation.

This notice is addressed to you for the purpose of advising you of the situation and we are asking you to endorse your acceptance on one copy of this letter, returning the same to us, which will constitute a modification of the aforesaid agreement and
721 will relieve the Railroad Company from handling livestock over said track to your plant.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By ——— ———,
Asst. Vice Pres. & Gen. Mgr.

CLEVELAND, OHIO, ———, 1938.

The undersigned consents to a modification of the above mentioned agreement and relieves the Railroad Company from any obligation to deliver livestock at its plant over the tracks above referred to.

THEURER-NORTON PROVISION COMPANY,
By ——— ———,
SWIFT & COMPANY,
By ——— ———,

722 *Exhibit No. 44*

THE THEURER-NORTON PROVISION CO.
CLEVELAND, O.

NOVEMBER 11, 1938.

MR. F. S. RISLEY,
Asst. Vice Pres. & Gen. Mgr.
New York Central R. R. Co., Cleveland, Ohio.

DEAR SIR: We wish to acknowledge receipt of your letter of October 6th, in duplicate, requesting us to agree to modification of our agreement dated May 14, 1934, to exclude livestock.

Although, as long as this agreement has been in effect, we have never used our siding for unloading livestock and at present do not intend to use the tracks for this purpose, we do not feel at this time, however, that we want to modify this agreement.

Should we intend, in the future, to use this siding for livestock we will be glad to take the matter up further with you.

Very truly yours,
THE THEURER NORTON PROVISION CO.
By AUG. F. LUCHT, *Secretary.*

fk.

723 *Exhibit No. 45*

NOVEMBER 29TH, 1938.

THEURER-NORTON PROVISION COMPANY, *Cleveland, Ohio.*

GENTLEMEN: Referring to the certain agreement between your company and the New York Central Railroad Company, lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway, dated January 22nd, 1934, covering sidetracks at Cleveland, Ohio, as shown on plan No. C-6199-KB, revised January 8, 1934, attached to said agreement and made a part thereof:

As you are aware it is necessary in order to reach the tracks covered by the aforesaid agreement for the Railroad Company to operate over a track which is located on the westerly side of West 65th Street and owned by The Cleveland Union Stock Yards Company.

This is to notify you that the Railroad Company is unable to make satisfactory arrangements with The Cleveland Union Stock Yards Company to permit it to handle livestock over the track owned by the Stock Yards Company. We are, however, permitted to handle dead freight, that is to say, any commodity other than livestock, upon and over said track for your accommodation.

This notice is addressed to you for the purpose of advising you of the situation and we are asking you to endorse your acceptance on one copy of this letter, returning the same to us,

which will constitute a modification of the aforesaid
724 agreement and will relieve the Railroad Company from handling livestock over said track to your plant.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Lessee of the Cleveland, Cincinnati, Chicago and St. Louis Railway.

By ——— ———,
Asst. Vice Pres. & Gen. Mgr.

CLEVELAND, OHIO, ———, 1938.

The undersigned consents to a modification of the above mentioned agreement and relieves the Railroad Company from any obligation to deliver livestock at its plant over the tracks above referred to.

THEURER-MORTON PROVISION COMPANY.
By ——— ———.

725 *Exhibit No. 46*

KOBLENZER BROTHERS
3187 West 65th Street
CLEVELAND, O.

NOVEMBER 18, 1938.

INTERSTATE COMMERCE COMMISSION, *Washington, D. C.*

GENTLEMEN: We have been operating a slaughtering establishment on W. 65th St., Cleveland, O., for years.

Have been buying cattle in the West and have had them delivered to our siding which is on a switch owned by the Big Four R. R. Co. To make delivery to this siding the cattle are switched over land owned by the Cleveland Union Stock Yards Co.

There has been no complaint about placing the cattle on our siding until recently, when the Stock Yards Co. refused to allow the Big Four R. R. Co. further use of the tracks on their property.

Several other slaughtering establishments use the same switch. The Big Four R. R. Co. will place cars on this switch to be loaded with fresh meat and will then switch them wherever they are to go, but absolutely refuse to place any livestock. This forces us to unload in the Stock Yards, which entails additional expense and the inconvenience of driving the cattle to our plant. The situation as explained by the Railroad Co. is due to the fact that the Stock Yards Co. is making an excessive charge against them for every car of livestock delivered over the Stock Yards property.

We feel that if the Railroad Co. is allowed to load and unload fresh meat they should also be allowed to place livestock.

Your opinion on this matter will be appreciated.

Yours very truly,

KOBLENZER BROS.
Per E. GALBRAITH,

726 *Exhibit No. 47*

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
WASHINGTON

RXL-BGH

NOVEMBER 26, 1938.

In reply please refer to Informal Complaint No. 168646.

Mr. F. C. STAFFORD, Freight Traffic Manager, New York Central System, Terminal Tower Bldg., Cleveland, Ohio.

DEAR SIR: There is enclosed copy of letter of November 18th, 1938, addressed to the Commission by Koblenzer Brothers, Cleveland, Ohio, relative to the delivery in switch movement at complainant's plant in that city of carloads of livestock originating in the West.

In order that there may be no misunderstanding we would be glad to have you investigate the complaint and to furnish the Commission with a report dealing with the merits thereof and the attitude of the parties toward taking action looking to the relief sought.

Respectfully,

(S) W. P. BARTEL, *Secretary.*

Encl.

727 *Exhibit No. 48*

(Sheet 1 of 4 sheets.)

DECEMBER 6TH, 1938.
F-25840

Informal Complaint No. 168646, Koblenzer Bros., Cleveland, Ohio.

Mr. W. P. BARTEL,
Secretary, Interstate Commerce Commission,
Washington, D. C.

DEAR SIR: Responsive to request contained in your letter of November 26th, on above subject, I am pleased to advise as follows:

1. Koblenzer Bros. operate a slaughtering establishment fronting on West 65th Street in Cleveland, Ohio.

2. This plant is served by sidetrack from the Big Four Railway

under regular sidetrack agreement, this track being situated in West 63rd Street.

3. To reach this sidetrack of Koblenzer Bros., it is necessary for the Big Four Railway to pass over a track situated in West 65th Street, which is the property of and is located on the land of the Cleveland Union Stock Yards Company.

4. The Big Four Railway for many years has had an agreement with the Cleveland Union Stock Yards Company covering the unrestricted use by the Railroad of the Stock Yard Company's track in West 65th Street, on terms that were mutually satisfactory. Section Fourth of this contract reads, as follows:

"Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land."

728 (Sheet 2 or 4 sheets.)

5. On December 31, 1934, the Stock Yards Company notified the Railroad Company that the terms of this contract could no longer be carried out with respect to traffic that was competitive with the Stock Yards Company; that competitive traffic includes livestock; that this letter would constitute the required notice of thirty days as to termination of the agreement; that after the termination of thirty days certain other stated charges would be made against the Railroad Company on any livestock handled direct to the unloading chutes of slaughterers in Cleveland over the tracks and/or land of the Stock Yards Company. Copy of this letter of December 31, 1934, is attached, marked Exhibit "A."

6. Inasmuch as this letter of December 31, 1934, constituted a notice of termination of agreement covering the use of tracks serving the Stock Yards Company, a conference was held on January 19, 1935, at which the Railroad Company stated it could not consent to pay the charge asked by the Stock Yards Company for the use of its track in West 65th Street for handling of livestock consigned for direct delivery to industries (Koblenzer Bros.) that could be reached by railroad only through the use of said track, and the Stock Yards Company would not modify its demand, therefore, in order that railroad service might be continued to the Stock Yards Company and the Stock Yards District a supplementary agreement was entered into, which provided under Section Fourth for the continued uninterrupted use of said tracks except for "competitive traffic," as to which a separate agreement was to be negotiated covering charges to be assessed. Section Fourth of

trackage agreement as amended January 25, 1935, is as follows:
"Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by

729 (Sheet 3 of 4 sheets.)

any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, except for competitive traffic a charge for which use shall be the subject of a separate agreement, of any and all tracks or portions thereof belonging to the industry and located on its land."

7. Several conferences have since been held between the Cleveland Union Stock Yards Company and the Railroad Company in an endeavor to arrive at terms of separate agreement for use of this sidetrack for handling livestock, as well as settlement of other demands made by the Cleveland Union Stock Yards Company against the carriers for a different basis of compensation for performing the transportation service at the Cleveland Union Stock Yards Company, which for several years has been on a basis of $1.00 per deck for loading or unloading. At none of these conferences could satisfactory agreement be reached. The final conference was held on September 7th, 1938, in which it was agreed that the words "competitive traffic" as used in the supplemental agreement of January 25th, 1935, meant "livestock." At this conference also the Stock Yards Company named a charge of $5.00 per deck as their price for the use by the Railroad of the sidetrack in 65th Street for the handling of livestock to certain slaughterers.

8. The Railroad Company could not consent to meet these demands of the Cleveland Union Stock Yards Company for the use of this track for handling livestock. The industries having sidetracks that are served through the medium of this track in West 65th Street, are carried in the Big Four switching tariff and are open to all carriers in Cleveland on a reciprocal switching basis, which is $3.15 per car. It was, therefore, necessary for the Big Four Railway to take appropriate action to relieve itself of the requirement of handling livestock over this track of the Cleveland Union Stock Yards Company.

730 (Sheet 4 of 4 sheets.)

9. Switching tariff was amended by Supplement No. 44, effective November 12, copy attached. Amendment to sidetrack agreement was submitted and accepted by the complainant after full explanation of the circumstances. Copy of agreement to this amendment is attached, marked Exhibit "B".

10. Of the various industries having sidetrack agreements and reached only through the use of this track in West 65th Street

only two of them are equipped to accept livestock direct at their packing plants, i. e., Koblenzer Bros. and Swift & Co. have used it very little for that purpose and Koblenzer Bros. use it only in part for their receipts of livestock, the balance being taken through the Cleveland Union Stock Yards Company.

11. The Cleveland Union Stock Yards Company have presented the Railroad Companies with bills each month for transportation service on the arbitrary basis stated by the Cleveland Union Stock Yards Company in their letter of January 11, 1935, copy of which is attached, marked Exhibit "C". Carriers have not paid these bills but have continued to tender the Stock Yards Company vouchers in payment of transportation service of loading and unloading at $1.00 per deck, which vouchers have been refused by the Stock Yards Company. Suit has now been entered against the New York Central and Big Four Railroads for the amounts of these unpaid bills, together with interest, aggregating $58,561.08, this suit being entered in the Court of Common Pleas, Cuyahoga County, State of Ohio, on November 3rd, 1938. Case has now been ordered removed to Federal District Court for Northern District of Ohio, Eastern Division. The amount above named is upon the basis of charges filed by the Cleveland Union Stock Yards Company with the Department of Agriculture and covers services performed by the Stock Yards Company in addition to the loading or unloading of stock in suitable pens as provided in Section 15 (5) of the Interstate Commerce Act.

Your very truly,

(Signed) F. O. STAFFORD,
Freight Traffic Manager.

731 *Exhibit "A"*

THE CLEVELAND UNION STOCK YARDS CO.
CLEVELAND, O.

DECEMBER 31ST, 1934.

Mr. C. M. WILLIAMS,
Supt., The New York Central R. R. Co.,
Cleveland Union Terminal, Cleveland, Ohio.

DEAR SIRS: Referring to your letter of December 26th, 1934 replying to our letters of November 21st and December 19th regarding the use of tracks owned by this Company for handling traffic to other industries, especially traffic competitive with the business of this Company.

It is noted that the matter is being given consideration that you will advise us what, if anything, you may be able to do. You do not give any indication of the time when such advice can be ex-

pected, and you express some doubt as to whether anything can be done.

The agreement entered into by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and The Cleveland Union Stock Yards Company, dated June 16th, 1924, relating to use of sidetracks, provides in paragraph "Fourth" that the railroad shall have the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its lead. It is our purpose to limit the free use of those tracks to traffic not competitive with the business of this Company. Competitive traffic includes, certainly, livestock and probably inbound movement of meat.

Paragraph "Sixth" of the agreement of June 16th, 1924, provides that the agreement shall terminate thirty days after written notice by either party to the other of that effect. This letter is the notice required.

After the termination of thirty days, on any livestock handled direct to the unloading chutes of slaughterers in Cleveland over the tracks and/or land of this Company, we will charge and expect you to pay us the charge named in our tariff No. 5 applicable to livestock consigned direct to packers and not offered for sale, which charge is at present 20¢ per head on cattle, 12¢ per head on calves, 7½¢ per head on hogs, and 5¢ per head on sheep.

Pending the execution of a new agreement, all provisions of the agreement of June 16th, 1924, except those relating to the free use for competitive traffic may continue.

THE CLEVELAND UNION STOCK YARDS CO.,

By (Signed) A. E. BAKER, *Pres. & Gen. Mgr.*

732

Exhibit "C"

THE CLEVELAND UNION STOCK YARDS CO.

CLEVELAND, OHIO

JANUARY 11, 1935.

Mr. C. M. WILLIAMS,
Supt., New York Central Lines,
Terminal Tower, Cleveland, Ohio.

DEAR SIR: For some time we have been permitting the free use of certain of our facilities in making deliveries of shipments consigned to packing concerns in the stockyards district. We find it necessary now to limit the free use to business or shipments not competitive with the business of the Cleveland Union Stock Yards Company.

Consequently, beginning February 1st, 1935, we will apply the charges stated in Exception (3) Item 1, Cleveland Union Stock Yards Co. Tariff No. 5, a copy of which is enclosed.

The charges will be assessed against the line haul carrier and will be assessed regardless of whether unloaded at stockyards unloading chutes or at the chutes of the following companies: The Cleveland Provision Co., The Federal Packing Co., The Hughes Provision Co., Koblenzer Bros., Kreinberg & Krasny, Swift & Company, The Theurer-Norton Provision Co.

Bills will be rendered monthly.

This in no way affects the delivery of noncompetitive freight over or by means of our property.

If you desire it the livestock will be weighed and the weights furnished you for freight purposes.

Yours very truly,

THE CLEVELAND UNION STOCK YARDS CO.,

By (signed) A. E. BAKER,

President and General Manager.

A. E. B.—W.

Same letter to all Cleveland Roads.

733 *Exhibit No. 49*

STIPULATION

Testimony of Mr. Pearson F. Marsh, Special Agent of the Interstate Commerce Commission, in Ex Parte No. 127 hearing, July, 1939, in which he stated (R. 824–825, Ex Parte 127):

"In 1916, Swift & Company purchased 1,000 shares of $100 par stock (*voting*) of The Cleveland Union Stock Yards Company for $100,000. In 1922, Swift & Company received a stock dividend of 60 per cent—(and) an additional 600 shares. In 1924, Swift & Company sold 300 shares after which its holdings were 13,000! (*1,300*) shares or approximately 6½ per cent of the total 200,000 shares then outstanding. In 1928, in connection with the reorganization of The Cleveland Union Stock Yards Company, Swift & Company turned in its 1,300 $100 par shares and received in exchange 5,200 shares of new no par stock. In 1933, Swift & Company sold 237 shares, and in March 1936, sold its remaining interest of 4,963 shares. Since that date, Swift & Company has had no interest in The Cleveland Union Stock Yards Company." [Italics ours.]

Swift & Company disposed of its shareholdings pursuant to an order dated February 27, 1920, issued by the Supreme Court of the District of Columbia in Equity Case 37623, entitled United States of America, petitioner, v. Swift & Company, et al., defendants. On January 31, 1931, Swift & Company was ordered to divest itself of ownership in public stockyard market companies and stockyard terminal railroads on or before January 31, 1932,

and asked for an extension of time in which to dispose of its interest and by an entry filed in this Equity Case No. 37623, on February 8, 1936, Swift & Company reported disposing of 4,963 shares of the capital stock of the Cleveland Union Stock Yards Company to John DeWitt, which sale was confirmed.

735 *Exhibit No. 50*

(Registry No. 56438-A)

CONTRACT No. 7349, C. C. C. & St. L. RY. CO., SWIFT & CO.

Crossing gates and signals at Union Stock Yards and West 65th Street, Cleveland, Ohio.

NOVEMBER 2, 1926.

This Agreement, made and executed in duplicate this 2nd day of November, 1926, by and between The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company, a corporation, as First Party, hereinafter called the "Railroad," and Swift and Company, a corporation, as Second Party, hereinafter called the "Industry," witnesseth:

Whereas the Industry desires to furnish, install, maintain and operate a set of twelve (12) gates and necessary electric gate signals to permit of the safe driving of stock from the Union Stock Yards across three tracks operated over by the Railroad and also across West 65th Street to the plant of the Industry at Cleveland, Cuyahoga County, Ohio, the closed position and approximate location of said gates being outlined by yellow lines upon the blueprint hereto attached, and

Whereas the Railroad, insofar as concerns its interest, is willing to permit the Industry to furnish, install, maintain and operate said gates and signals under the terms and conditions of this agreement;

Now, therefore, it is mutually covenanted and agreed:

First. That the Railroad, insofar as its interests are concerned, will permit the Industry to furnish, install and operate said gates and necessary electric gate signals of the construction and in the location indicated on the blueprint hereto attached, dated April 28th, 1925, and made a part of this agreement. Said gates and signals shall be constructed and shall be operated, maintained and renewed by the Industry at its own expense.

Second. That the Industry will operate said gates and gate signals or cause them to be operated in such a manner as not to interfere with the safe operation by the Railroad over said tracks.

Third. That the Industry hereby agrees to assume and save the Railroad free and harmless from all responsibility for loss

of, damage and injury to all stock and the Industry's employes using the said gates, occasioned by any act or omission of the Industry, and regardless of whether such loss, damage or injury shall arise from the act or omission of the Industry, or from concurring negligence of both parties, their agents, servants or employes.

Fourth. That either party hereto may terminate this agreement by giving to the other party thirty (30) days' notice in writing of its intention so to do.

In witness whereof, the parties hereto have caused this agreement to be executed in duplicate the day and year first above written.

THE CLEVELAND, CINCINNATI, CHICAGO AND SAINT LOUIS RAILWAY COMPANY,
By: C. S. MILLARD, *General Manager.*
SWIFT & COMPANY,
By: ALLEN B. SWIFT, *Vice President.*

Witnesses:
S. W. GOULD.
P. T. W.
T. J. H.–*Sup't*
H. N. Q.–R. C. M.
W. H. S.–M. S. A. B. S.
R. O. H.–J. S. B.–H. W. T.
Attest:
B. A. PEACOCK, *Sec'y*

736 *Exhibit No. 51*

Before the Interstate Commerce Commission

Docket Nos. 28421, Sub. 1

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

vs.

LIVESTOCK TERMINAL SERVICE COMPANY

Joint petition of complainants and defendant for rehearing, reconsideration, and redetermination of reasonable charges for loading and unloading livestock at Cleveland, Ohio, as of June 10, 1944, and thereafter

Come now The Baltimore and Ohio Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Erie Railroad Company, and The Wheeling and Lake Erie Railway Company, complainants in the above-entitled pro-


WEST 65TH
STREET
SWIFT & CO.
PLAN
SWIFT & CO.
Nov. 7, 1926

ceeding (hereinafter called the railroads), and Livestock Terminal Service Company, the defendant in this proceeding (hereinafter sometimes called the Service Company) and file this their petition for rehearing, reconsideration, and for a redetermination
737 of reasonable charges for loading and unloading livestock at The Cleveland Union Stock Yards Company, Cleveland, Ohio, as of June 19, 1944, and thereafter. In support of the said petition, the railroads and Service Company respectfully show:

I

In its report and order of May 11, 1943, in Docket 28241, Sub. No. 1 (255 I. C. C. 579), among other things the Commission prescribed a charge of $1.25 per deck for the services of the Service Company in loading and unloading livestock at the Cleveland Union Stock Yards, Cleveland, Ohio. In accordance with the Commission's order, the said charge was filed in tariffs of the Service Company and is presently shown in that Company's I. C. C. No. 4. The said charge of $1.25 was determined by the Commission on evidence submitted as of April 24, 1942, the last day of the hearing. Much of that evidence was conflicting in character, in that there had been a dispute between the parties on many points important in the determination of reasonable charges for loading and unloading.

II

The railroads and Service Company recognize that there have been material changes in the circumstances and conditions in respect of the loading and unloading of livestock at Cleveland since the presentation of evidence on which the Commission rendered its decision in this proceeding. The more important of these changes, as seen by the Service Company and rail-
738 roads, may be stated concisely as follows:

(a) On the application of the Service Company in Finance Docket 14038, Division 4 authorized abandonment of operations by that Company on and after June 19, 1944. The said application for abandonment rested chiefly on the Service Company's contentions that it could not pay its operating expenses and profitably continue operations on the charge of $1.25 per deck for loading and unloading under conditions which presently prevail.

(b) The authority given the Service Company to abandon operations has confronted the railroads with a difficult, immediate and very pressing problem, in that it threatens the continued and orderly handling of livestock to and from the Cleveland Union Stock Yards.

(c) On March 11, 1944, a fire destroyed some of the facilities at the Cleveland Union Stock Yards, and a determination of the facilities that should be rehabilitated and maintained in the future is necessarily associated with the question as to the charges which may be paid in the future for loading and unloading livestock at the Cleveland Union Stock Yards.

(d) The Service Company contends that its operating expenses, particularly its labor costs, materially increased since the record was closed in the instant proceeding, but the railroads neither admit nor deny the correctness of this contention. The Service Company also contends that as of June 19, 1944, and thereafter the Commission's previous findings will not allow for sufficient facilities for loading and unloading services, but the railroads neither admit or deny the correctness of this contention.

739

III

Because of changed conditions, as alleged in paragraph II hereof, the railroads and the Service Company agree that the Commission should reexamine the question of reasonable charges for loading and unloading, which should apply on and after June 19, 1944. Pending the determination of this issue by the Commission, the Service Company and The Cleveland Union Stock Yards Company will perfect some arrangement that will enable the Service Company to continue operations on and after June 19, 1944, for a period of approximately sixty (60) days, but such operations shall be without prejudice to the Service Company's right thereafter to avail of any course which may be open to it, including any course which it may have under findings and order or orders now or hereafter entered in Finance Docket 14038.

IV

(a) The railroads, the Service Company and The Cleveland Union Stock Yards Company have agreed to expedite the preparation and presentation of evidence that will be required for the Commission's further decision. To that end they have agreed to do their utmost to come to a common understanding on the additional evidence to be presented, in the hope that there will be very few, if any, material points or important evidence on which the parties are in conflict. The railroads and Service Company ask that the case be assigned for hearing at Cleveland, Ohio, within approximately 25 to 30 days from the date of the filing of this petition; and they agree that briefs, if any, should be submitted within 15 days after such oral hearing and that a proposed report by an examiner and oral argument are waived. The railroads and Service Company ask that the further

740

decision of the Commission be rendered as promptly as possible. In the time which elapses between the date of the filing this petition and the date of the hearing the parties will progress their negotiations, and if they can agree on all disputed matters they will submit the additional evidence in the form of a stipulation and ask the Commission to waive oral hearing.

(b) In negotiations between the Service Company, Stock Yards Company and the railroads, following the Commission's findings of May 19, 1944, in Finance Docket 14038, efforts have been made to reach a solution of the situation having proper regard for the paramount public interest, in the hope that such a solution could be presented for consideration of the Commission; and efforts have also been made to reach a formula for arriving at the
741 costs of labor and the reasonable value of facilities necessary in performing the service of loading and unloading livestock on and after June 19, 1944. The railroads are of the opinion that in the event agreement cannot be reached on any of these subjects such differences shall be determined by the Commission upon the evidence to be presented to it. To illustrate, if in the course of negotiations the interested parties are unable to agree among themselves upon the value that should be placed on facilities necessary for loading and unloading, it is agreed that such value, as may be fixed by the Commission, for purposes of the reasonable loading and unloading charge on and after June 19, 1944, should also be the value for purposes of the rental which should be paid by the Service Company to the Stock Yard Company for such facilities. While denying that the Commission has jurisdiction as to it, and also denying that the Commission has jurisdiction to determine the value of or rental for any of its property, the Stock Yards Company has made a commitment to the Service Company that during the continuance of operations by the Service Company, on and after June 19, 1944, the Stock Yards Company will accept the value as shall be determined by the Commission, under the above-mentioned circumstances, as the basis for the rental to be paid by the Service Company; the said commitment however is subject to the rights of the Stock Yards Company to terminate its lease or leases on a reasonable basis.

V

742 Pending the further decision of this Commission, the Service Company will continue to perform loading and unloading at Cleveland Union Stock Yards, Cleveland, Ohio. The railroads will continue to pay $1.25 per deck for that service, but will readjust the charges on shipments handled on June 19, 1944, and thereafter, to conform to the Commission's further find-

ing in this proceeding. While this proceeding is under consideration by the Commision the parties also will give continued thought to the problem of handling livestock at Cleveland, in the hope that some permanent arrangement, mutually satisfactory to all interested parties, can be perfected.

VI

The filing of this joint petition by the railroads and the Service Company, and the resulting action of the Commission, are without prejudice to the contentions and rights of the railroads, the Service Company or Stock Yards Company under petitions, orders, and findings in other cases before the Commission or in cases pending in courts, or otherwise. In other words, this joint petition is intended to result in a determination of reasonable charges for loading and unloading as of June 19, 1944, and thereafter, without prejudice to the contentions and rights of the parties because of issues pending or action taken in this or in other proceedings. In furtherance of the desire of the parties that the status quo should be maintained, as aforesaid, the railroads do not withdraw their pending petitions recently filed in Finance Docket 14038 and Ex Parte 127, but they ask that the Commission
743 withhold action on the said petitions pending a determination by the Commission of reasonable loading and unloading charges as of June 19, 1944, and thereafter, based on the further evidence to be submitted in the instant proceeding. To the same end the railroads and Service Company agree that the Service Company reserves all its rights and advantages under the findings and order or further orders in Finance Docket 14038, subject to the Commission's later disposition of the petition pending in that case—assuming that it later becomes necessary for the railroads or the Service Company to urge the Commission to consider and rule on the said petition.

Wherefore, the Railroads and the Service Company pray:

(a) That the Commission reopen this proceeding, and upon reconsideration, determine the reasonable charge for loading and unloading livestock at the Cleveland Union Stock Yards, Cleveland, Ohio, as of June 19, 1944, and thereafter;

(b) That after determining the reasonable charge for loading and unloading livestock as of June 19, 1944, and thereafter, the Commission modify its order entered herein on the 11th day of May 1943, to conform with the Commission's findings upon reconsideration and that the Commission authorize a readjustment of loading and unloading charges on shipments handled on and after June 19, 1944 to conform with the Commission's further findings;

(c) That this proceeding be expedited and that, if pos-
744 sible, it be handled by the Commission in accordance with the suggestions as to procedure set forth in paragraph IV of this petition;

(d) That the Commission enter such further order or orders as it may deem proper in the premises.

Respectfully submitted.

ANDREW P. MARTIN,
WILLIS T. PIERSON,
DWIGHT B. BUSS,
G. H. P. LACEY,
JOHN J. FITZPATRICK,
W. N. KING,
R. R. PIERCE,
1324 West 3rd St., Cleveland 13, Ohio,
Counsel for Complainants.
C. B. HEINEMANN, JR.,
For Defendant, Livestock Terminal Service Company.

JUNE 17, 1944.

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing joint petition of complainants and defendant upon all parties of record in Finance Docket 28421 Sub 1.

Dated at Cleveland, Ohio, this 17th day of June 1944.

R. R. PIERCE, *of Counsel.*

745 *Exhibit No. 52*

ORDINANCE No. 10944

An Ordnance Granting to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company the Right-of-way To Lay a Switch Track Across and Along West 63rd Street

SECTION 1. Be it ordained by the Council of the City of Cleveland, State of Ohio, that permission, on the conditions hereinafter mentioned, is hereby given to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to lay a switch track across and along West 63rd Street from said Company's tracks at West 63rd Street, shown by the red lines on the plat, which plat is referred to herein and is attached to the original copy of this Ordinance.

SECTION 2. That such switch track should have no frogs or switch points within the limits of the street and shall be laid to the grade of said West 63rd Street, as now established and paved, and shall be relaid to such grades as may hereafter be established and shall be planked between the rails and 18 inches outside of

each rail. The water from the gutters of said street shall be conveyed under said track in a proper and acceptable manner; or the necessary catchbasins shall be constructed and connected with the sewer in said West 63rd Street, as the City Engineer shall direct at the expense of said Railroad Company; any paving displaced shall be relaid outside of track and at the expense of said Railroad Company, and said tracks, gutters, and planking shall be kept in constant good repair, and the track properly lighted, by or at the expense of said Railroad Company, its successors or assigns as the Board of Public Service of the City of Cleveland may direct, and to the acceptance of said Board.

SECTION 3. That the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors or assigns, hereby obligates itself to at any and all times hold the City harmless from any damage to person or property or expense of any kind, that may arise by reason of said switch track or the permission herein granted; to at all times fully obey any general or special regulations that may now or hereafter be enacted governing or applicable to, the said switch track, to waive any and all rights to the contrary, and will support or remove said track as may be
746 ordered by the Board of Public Service when necessary for the purpose of making any general improvements in said West 63rd Street, and at no time to stand cars upon any portion of said West 63rd Street, or allow the same to be done.

SECTION 4. That the Council reserves the right to at any and times to revoke this permission, and that whenever so revoked that the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, its successors or assigns, agree to remove the track from said West 63rd Street and return the street and pavement to the condition required by the Board of Public Service within 30 days after receiving notice of the revocation of this grant; and in case it shall not so remove the same and repair the pavement properly, then the Board of Public Service may cause the same to be done at the expense of said Company, its successors or assigns.

SECTION 5. That this Ordinance shall take effect and be in force from and after the earliest period allowed by law, and the filing with the City Clerk of a written acceptance of the terms and conditions hereof by said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the payment to the City Auditor the expense of printing and advertising the same.

Passed May 25, 1908.

C. W. LAPP,
President of the Council.
PETER WITT,
City Clerk.

Approved by the Mayor May 28, 1908.

748 *Exhibit No. 63*

Agreement, made and entered into this Fourteenth day of July 1916, by and between the Cleveland Union Stock Yards Company, a corporation, as first party, and The Cleveland Provision Company, a corporation, witnesseth:

Whereas the party of the first part has for years had close relations with the party of the second part, the second party having been and now being a large patron of the first party; and

Whereas the first party believes it to be for its advantage to make the connection closer and to procure a location of a portion of the plant of the second party adjoining the property of the first party,

Now, therefore, it is mutually agreed between the parties hereto as follows:

First party agrees to sell and convey to second party, by good and sufficient deed, free of all incumbrance except certain reservations made by the Scheurens in their deed to first party upon a portion of the premises, the following described premises, to wit:

Situated in the City of Cleveland, County of Cuyahoga, and State of Ohio, and known as being part of original Brooklyn Township, Lot number 34, now in the City of Cleveland, bounded as follows:

Beginning in the westerly line of West 65th Street, at the intersection of said westerly line with the southerly line of said original lot number 34; thence northerly along the westerly line of West 65th Street $95\frac{5}{100}$ feet to an angle in said westerly line of West 65th Street; thence northerly along the westerly
749 line of West 65th Street, $321\frac{37}{100}$ feet to a stake; thence westerly at right angles with the westerly line of West 65th Street 745 feet; thence northerly parallel with the westerly line of West 65th Street 200 feet; thence westerly at right angles with the westerly line of West 65th Street $156\frac{50}{100}$ feet; thence southerly parallel with the westerly line of West 65th Street $540\frac{98}{100}$ feet to the southerly line of said original Brooklyn Township lot number 34; thence easterly along the southerly line of said original lot, $898\frac{14}{100}$ feet to the beginning and containing $7\frac{751}{1000}$ acres of land according to the survey of Charles W. Rout, C. E., made July 1916.

Also, to grant to second party a right-of-way connecting the right-of-way of the Big Four Railroad, so called, with the above-described parcel, said right-of-way to be sixteen (16) feet in width; the first party reserving, in connection therewith, the right to tap on either or both sides for such switch tracks as it may desire any track or tracks the second party may place on said right-of-way.

First Party also agrees to issue and deliver to second party two thousand (2,000) shares of its capital stock of the par value of One Hundred Dollars ($100.00) each, being Two Hundred Thousand Dollars ($200,000.00) par value of the stock of first party.

In consideration therefor, second party agrees to pay to first party upon the delivery of said stock the sum of Two Hundred Thousand Dollars ($200,000.00) in cash.

Second party also agrees that the investment it is making in said stock and in said land is to be a permanent investment
750 on its part, for the purpose of developing its business; that it regards its alliance with the first party as helpful in developing its business, so that the interests of each in making this contract are intended to be mutual and permanent; and second party agrees also to begin immediately the erecting upon the above-described premises a beef-packing house and to expend within the next year at least One Hundred and Fifty Thousand ($150,000.00) Dollars in the erection of improvements upon said property, to be used as a permanent place for carrying on the beef-packing business by the second party and such other lines of business as the future shall from time to time develop.

THE CLEVELAND UNION STOCK YARDS COMPANY,
By E. A. MURPHY, *President.*
ALLEN S. WALTZ, *Secretary.*
THE CLEVELAND PROVISION COMPANY,
By S. T. NASH, *President.*
JOS. H. NASH, *Secretary.*

751 *Exhibit No. 54*

THE CLEVELAND UNION STOCK YARDS COMPANY TO THE CLEVELAND PROVISION COMPANY

Dated July 14, 1916, W. D., Recorded Vol. 1814, Page 86, Deed Cons. $100.00

Know all men by these presents, that the Cleveland Union Stock Yards Company, a corporation, the grantor for the consideration of $100.00 received to its full satisfaction of the Cleveland Provision Company, a Corporation the grantee, to give, grant, bargain, sell, and convey unto the said grantee, its successors and assigns the following described premises:

Situated in the City of Cleveland, County of Cuyahoga, and State of Ohio, and known as being part of original Brooklyn Township, Lot 34 now in the City of Cleveland, bounded as follows:

Beginning in the Wly. line of West 65th Street at the inter-

section of said westerly line with the southerly line of original lot 34.

Thence northerly along the westerly line of West 65th Street 9.53 ft. to an angle in said westerly line of West 65th Street.

Thence northerly along the westerly line of West 65th Street 321.27 ft. to a stake.

Thence westerly at right angles with the westerly line of West 65th Street 745 feet.

Thence northerly parallel with the westerly line of West 65th Street 200 ft.

Thence westerly at right angles with the westerly line of West 65th Street 156.5 feet.

Thence southerly parallel with the westerly line of West 65th Street 549.68 ft. to the southerly line of said original Brooklyn Township Lot 34.

Thence easterly along the southerly line of said original Lot, 893.11 feet to the beginning. Containing 7.751 acres of land.

752 A portion of the above-described property was conveyed to The Cleveland Union Stock Yards Company by Phillipina Scheuren et al., by deed recorded in Vol. 1799, Page 588 of Cuyahoga County Records, July 3, 1916, which deed contained the following reservations:

Excepting and reserving to the Grantors, their heirs and assigns, the right to continue until Nov. 1, 1918, the full use and enjoyment of all that portion of the premises herein described other than the meadowland, the part the right to the use and occupancy of which is reserved being now planted to asparagus beds, etc.

The Grantee herein accepts, this conveyance, subject to the aforesaid reservations. Also a right-of-way connecting the right-of-way of the Big-Four Railroad, so called, with the above-described premises, said right-of-way being 16 ft. in width and to be located and particularly described by a conveyance from Grantor to Grantee hereafter to be made; the Grantor reserving, in connection therewith, the right to tap on either or both sides for such switch tracks as it may desire, or tracks the Grantee, its successors or assigns, may place on said right-of-way, be the same more or less, but subject to all legal highways.

To have and to hold the above-granted premises with the appurtenances thereunto belonging, unto the said grantee, its successors and assigns forever, and the said grantor, does for itself and its successors and assigns, covenant with the said grantee, its successors and assigns, that at and until the ensealing of these presents, it is well seized of the above-described premises as a good and indefeasible estate in Fee Simple, and have good right to bargain and sell the same in a manner and form as above written; that the same are free and clear from all incumbrances whatsoever and

that it will Warrant and Defend said premises to the said grantee against all lawful claims and demands whatsoever.

753 In witness whereof, the Cleveland Union Stock Yards Company by its President duly attested by its Secretary, they being thereunto duly authorized by a Resolution of the Board of Directors, of said Company, has hereunto set its hand and corporate seal this 14th day of July in the year 1916.

THE CLEVELAND UNION STOCK YARDS COMPANY,
E. A. MURPHY, *President*,
ALLEN S. WALTZ, *Secretary*.

Witnesses:
S. H. TOLLES.
ANDREW SQUIRE.
(Jurat.)

F. S. WHITCOMB, *Notary Public*.

U. S. Rev. Stamps $24.00; Transferred 7-14-16; Received 7-14-16; Recorded 7-15-16; Fee for Record $1.40.

HOSEA PAUL, *Recorder*.

754 *Exhibit No. 55*

GRANT OF RIGHT-OF-WAY

Know all men by these presents: That The Cleveland Union Stock Yards Company, a Corporation, Grantor for the consideration of $10.00 and other valuable consideration received to its full satisfaction of Irving Kane, Trustee for the Cleveland Provision Company, under proceedings in the United States District Court for the Northern District of Ohio, Eastern Division, being Cause No. 35635 in the Bankruptcy Division of said Court, the Grantor, does hereby grant and release unto the said Grantee, his successors and assigns, a 16 ft. right-of-way hereinafter particularly described, over the following described property:

Situated in the City of Cleveland, County of Cuyahoga, and State of Ohio, and known as being part of original Brooklyn Township Lot No. 34, bounded Northwesterly by the Southeasterly line of the Cleveland, Cincinnati, Chicago and St. Louis Railroad and the southeasterly line of the Wheeling & Lake Erie Railroad, on the east by the westerly line of West 65th Street, and the westerly line of premises owned by Cleveland Provision Company, southerly by the northerly line of premises owned by the Cleveland Provision Company and by the southerly line of said original Lot No. 34, and westerly by the Westerly line of said original Lot No. 34, excepting therefrom land fronting on the westerly side of West 65th Street, now owned by Kreinberg and Krasny, Incor-

porated, acquired by deed dated June 1, 1932, and recorded in Volume 4259, Page 689 of Cuyahoga County records of deeds, and a parcel of land fronting on the westerly side of West 65th Street, owned by Rose M. Lasko, acquired by deed dated April 21, 1936, recorded in Volume 4609, Page 270 of Cuyahoga County records of deeds, which said right-of-way is described as follows:

Being a right-of-way 16 ft. in width, the center line of which begins at a point in the north line of property of the Cleveland Union Stock Yards Company, described above and the south line of the right-of-way of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company 400 ft. south 47°58′ West of the intersection of the south line of said Railway Company and the west line of West 65th Street, said intersection being the northeast corner of said land of the Cleveland Union Stock Yards Company, thence South 27° west 160 ft. to a point 8 ft. east of the right-of-way of the Wheeling & Lake Erie Railroad; thence South 47°58′ West along the south line of the said Wheeling & Lake Erie right-of-way 1,050 ft., thence in a 14° curve to the left, south 40° West 100 ft. south 26° West 100 ft., South 12° West 100 ft., South 2° East 100 ft., South 16° East 100 ft., South 30° East 100
755 ft. South 44° East 100 ft., South 58° East 100 ft., Thence north of a building known as the Equestrium South 72° East 150 ft. to a point in the north line of the property now owned by the Cleveland Provision Company 60 ft. east of the northwest corner of said property, upon which the Grantor agrees, at its own expense, to erect and, so long as it is engaged in the business of operating a stockyard or a livestock depot, and furnishing stockyards and transportation services at its present location at Cleveland, Ohio, maintain a single track railroad spur or switch connecting the property (of the Grantee, as Trustee) conveyed by the Grantor to the Cleveland Provision Company by deed dated July 14, 1916, and recorded in Volume 1814, page 86, of Cuyahoga County records, with the right-of-way of the Cleveland, Cincinnati, Chicago and St. Louis Railway, so called, reserving unto the grantor:

1. The right at its own expense, whenever it, or its successors and assigns, so desires, either temporarily, from time to time, or permanently to locate or relocate elsewhere upon the property of Grantor, and to substitute for the right-of-way herein specifically granted for the use of the Grantee, any other right-of-way and the tracks now or hereafter placed thereon, whether as now located or from time to time relocated by and at the option of the Grantor, to be used by the Grantee for the interchange of cars between the right-of-way of the Cleveland, Cincinnati, Chicago & St. Louis Railway, so called, and the property of the Grantee, described in the deed from the Grantor to the Cleveland Provision

Company dated July 14, 1916, recorded in Volume 1814, page 86, of Cuyahoga County records. However, no change or relocation of said track shall thereby deprive the Grantee, his successors and assigns, of uninterrupted use of a switch track.

2. The right to tap on either or both sides of any track or tracks placed upon said right-of-way, whether as specifically described or as relocated, and any track or tracks located upon the property of the Grantee conveyed by the Grantor to the Cleveland Provision Company by deed dated July 14, 1916, for such switch tracks as the Grantor, or its successors or assigns, may desire.

3. The right to have the free and uninterrupted use of any track or tracks located upon the property of the Grantee conveyed from the Grantor, to the Cleveland Provision Company by deed dated July 14, 1916, recorded in Volume 1814, page 86 of Cuyahoga County records, so long as such use does not interfere with the business of the Grantee, his successors and assigns.

756 4. The right to grant or refuse the use of said right-of-way and tracks, whether same be the right-of-way specifically described herein or one substituted therefore, to or by all persons, firms, societies, associations, or corporations, and for all purposes, except the Grantee, his successors and assigns, for the common use thereof in connection with the business of the Grantee, his successors and assigns.

To have and to hold said right-of-way and the tracks thereon unto the Grantee, his successors and assigns, as an appurtenance to the aforesaid land of the Grantee, conveyed by deed from the Grantor to the Cleveland Provision Company, dated July 14, 1916, recorded in Vol. 1814, page 86, of Cuyahoga County records, subject, however, to the conditions herein contained.

As a part of the consideration for this grant, the Grantee herein, for himself, his successors and assigns, convenants and agrees to and with the said Grantor, its successors and assigns, that the Grantee, his successors and assigns, shall pay as rental to the Grantor, its successors and assigns, the sum of $2.00 for each loaded car received or shipped over said right-of-way from any plant located on the property conveyed by the Grantor to the Cleveland Provision Company by deed dated July 14, 1916, provided that the maximum monthly rental to be paid by the Grantee shall be $100.00 per month; said rental to be paid monthly within 15 days after the close of each month, provided, however, that during the period in which the Grantee, his successors and assigns, shall engage in the business of slaughtering livestock on said property such rental shall not accrue.

This conveyance is made subject to the following conditions of forfeiture which shall apply only so long as the Grantor, its successors and assigns, is engaged in the business of operating

stockyards or livestock depot, and furnishing stockyards or transportation services at its present location in Cleveland, Ohio:

1. That the Grantee, his successors and assigns, shall not use or grant the use of said right-of-way or tracks for the movement or interchange of cars or live cattle, swine, or sheep.

2. That the Grantee, his successors and assigns, shall purchase at the livestock market conducted by the Grantor, its successors and assigns, or shall receive thru the livestock depot operated by the Grantor, its successors and assigns, all live cattle, swine,
757 and sheep slaughtered on the property conveyed by said deed from the Grantor to the Cleveland Provision Company dated July 14, 1916.

3. That the grantee, his successors and assigns, on said property deeded by the Grantor to the Cleveland Provision Company by deed dated July 14, 1916, and recorded in Volume 1814, page 86, of Cuyahoga County records, shall not erect or use any pens or other enclosures commonly known as stockyards, nor engage in the business of furnishing stockyards or transportation services, including the receiving, handling, feeding, watering, holding, and caring for, buying, selling, weighing, unloading, shipping, or transportation of live cattle, swine, and sheep, except that such pens may be erected and used to the extent necessary to confine any livestock awaiting immediate slaughter in any plant on said property.

If the Grantee, his successors and assigns, shall pay rental when due and shall not violate any of the conditions of forfeiture hereinbefore set forth in the next preceding paragraphs, the Grantor, its successors and assigns, covenants and agrees that the Grantee, his successors and assigns, shall have and enjoy quiet use and possession of said easement. If the Grantee, his successors and assigns, shall fail to pay said rental within 30 days after the same shall become due, or shall fail to perform any or all of said conditions, then it shall be lawful for the Grantor, its successors and assigns, to enter upon the right-of-way or easement herein granted and again have, repossess and enjoy the same and exclude the Grantee, his successors and assigns, therefrom, as fully and completely as if the grant had not been made, and thereupon this grant shall be utterly void and of no effect.

It is agreed by the parties hereto, their respective successors and assigns, that this grant is in furtherance of and in full compliance with the provisions for a 16-ft. right-of-way contained in the deed from the Grantor to the Cleveland Provision Company, dated July 14, 1916, and recorded in Volume 1814, Page 86, of Cuyahoga County records; and that it is a full and complete settlement of all controversies involved in the case of the Cleveland Union Stock Yards Company vs. The Cleveland Provision

Company, et al., No. 15727 in the Court of Appeals of Cuyahoga County.

In testimony whereof, the said Grantor has caused its corporate seal to be hereto affixed, and these presents to be subscribed by its President and Secretary, this 24th day of November in the year 1936.

THE CLEVELAND UNION STOCK YARDS COMPANY,
By A. Z. BAKER, *President*,
PHILIP H. COAD, *Secretary*.

Signed and acknowledged in the presence of:

VIRGINIA WILLIAMS.
M. S. FARMER.

Recorded in Volume 4666, Page 610.

758 *Exhibit No. 58*

Know all men by these presents that this indenture made this 16th day of February, in the year One Thousand Nine Hundred and Thirty Seven between Irving Kane, as Trustee for the Cleveland Provision Company, Debtor, in liquidation under Section 77-B of the Bankruptcy Act, of the City of Cleveland, County of Cuyahoga, State of Ohio (hereinafter sometimes designated as "Grantor"), and Earl C. Gibbs of Cleveland, Ohio (hereinafter sometimes designated as "Grantee"), witnesseth:

Whereas a petition for reorganization of The Cleveland Provision Company under Section 77-B of the Bankruptcy Act was filed in District Court of the United States for the Northern District of Ohio, Eastern Division, on the 15th day of June 1935 and

Whereas an order of liquidation was decreed by the District Court on the 19th day of June 1936, pursuant to Section 77-B (K) of the Bankruptcy Act, and said Irving Kane thereafter was duly appointed Trustee on the 10th day of July 1936, and thereafter duly qualified and has continued to act and is now acting as such Trustee; and

Whereas said Irving Kane as Trustee for the Debtor was duly authorized, after notice to the mortgage bondholders, lienors, and creditors; by an order of Wm. B. Woods, Esq., Referee in Bankruptcy, dated January 19, 1937, to sell and convey the property hereinafter mentioned at private sale, free and clear of liens and free and clear of taxes, or subject to taxes, as the purchaser may elect, and the said sale having been had on January 19, 1937, and thereafter having been confirmed by an order of Wm. B. Woods, Esq., Referee in Bankruptcy, dated the 29th day of January 1937; and

Whereas W. W. Weisman, the purchaser and his successors in

interest, pursuant to the provisions for assignment contained in said contract of sale, have designated Earl C. Gibbs as the party to whom the real estate herein shall be conveyed;

Now, therefore, I the said Irving Kane, as Trustee for The Cleveland Provision Company, debtor, by virtue of the power and authority vested in me as aforesaid, and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations, receipt of which are hereby acknowledged, do hereby Give, Grant, Bargain, Sell, Release, Quit Claim, Convey, Assign, and Set over unto the Earl C. Gibbs, his heirs and assigns forever, all my right title, and interest in and to the following described premises:

Situated in the City of Cleveland, County of Cuyahoga,
759 and State of Ohio, and known as being part of Original Brooklyn Township Lot No. 34 and is bounded and described as follows:

Begining at a point in the westerly line of West 65th Street, which marks the intersection of the said westerly line with the northerly line of Storer Avenue.

Thence North 1°15'00" East along westerly line of West 65th Street. 337 feet but to the northeast corner of lands described in Supplemental Indenture to the Cleveland Trust Company from the Cleveland Provision Company recorded in Volume 4306, Page 587.

Thence north 88°45'00" West along the northerly line of lands so conveyed 222.56 ft. to an angle.

Thence South 78°05'50" West, continuing along the northerly line of lands so conveyed 118.76 feet to an angle point which marks the westerly end of lands so conveyed, and is in the northerly line of lands described as Parcel 4 recorded in Volume 2543, Page 608 to 637 between the Cleveland Provision Company and Cleveland Trust Company.

Thence north 88°45'00" West, along the northerly line of lands so described in Parcel 4, 120.09 feet to the northeast corner of lands described in a partial release from the Cleveland Trust Company to Cleveland Provision Company, July 1, 1933, recorded in Volume 136, Page 427. Said property so released now owned by the Cleveland Stock Yards Company.

Thence South 1°15'00" West, along the easterly side of said last mentioned lands so released 1.5 ft. to the southeast corner of said lands.

Thence North 88°45'00" West, along the southerly line of said lands so released 446 feet to the southwest corner thereof, which is also in the westerly line of lands described in Parcel 4 hereinbefore referred to.

Thence South 1°15'00" West along the westerly line of property described in said Parcel 4, 348.18 feet to the southwest corner thereof, which is also in said southerly line of original Lot 34.

Thence east along said southerly line of Lot 34, 137.68 feet but to the west end of Storer Avenue.

Thence north along the west line of said dedication of Storer Avenue, 30 feet to the northerly line of dedication of Storer Avenue.

760 Thence east along said northerly line of Storer Avenue, SW. as so dedicated 764.68 feet to said westerly line of West 65th Street and place of beginning.

The above described parcel of land contains 6.720 acres be the same more or less, but subject to all legal highways, together with right-of-way and easement 16 feet in width over lands of the Cleveland Union Stock Yards Company, connecting the premises above described with the tracks and right-of-way of the Big-Four Railway so called, together with any and all easements, licenses, benefits, and appurtenances attaching to said land, and particularly including the grant of right-of-way or easement conveyed to Irving Kane, Trustee as aforesaid, by the Cleveland Union Stock Yards Company upon the approval of the Bankruptcy Court, which said right-of-way was executed on November 24, 1936, and recorded (2581931), Volume 4666, Page 610, Cuyahoga County records, and together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold the said above granted premises with the appurtenances thereof unto the Grantee, his heirs and assigns forever, as fully and completely as the Grantor can and ought to do pursuant to the Statute and his authority as aforesaid.

In witness thereof, said Irving Kane, as Trustee of The Cleveland Provision Company in liquidation under Section 77–B of the Bankruptcy Act as aforesaid has hereunto set his name the day and year first above written.

IRVING KANE,
Trustee for Cleveland Provision Company, Debtor-in liquidation under Section 77–B of the Banruptcy Act.

Signed in the presence of:
JOHN S. BEARD
IDA R. MCDOWELL.

STATE OF OHIO,
Cuyahoga County, ss:

Before me, a Notary Public, in and for said County
761 and State, personally appeared the above named Irving

Kane, known to me and to me known to be the Trustee for the Cleveland Provision Company, Debtor, in liquidation under Section 77-B of the Bankruptcy Act, and the Grantor in the foregoing deed, he acknowledged that he did sign the aforegoing instrument for and on behalf of the Estate of said Debtor, and that the same is his free act and deed personally and as such Trustee.

In testimony whereof, I have hereunto set my hand this 16th day of February 1937.

IDA R. McDOWELL, *Notary Public.*

Filed for Record: 2-19-37
Recorded: 2-20-37
Volume 4701, Page 129.
Revenue Stamps $67.50.

762 *Exhibit No. 59*

SWIFT & COMPANY
Union Stock Yards
CLEVELAND, O.

JUNE 18TH, 1919.

Personal. File 1379

MR. E. M. COSTIN,
Federal Manager, Big Four Railroad, Cincinnati, Ohio.

DEAR SIR: For about two (2) years we have been working mainly with your Engineer's office at Galion Ohio, and others interested, for the improvement of switching facilities in the Clark Avenue Packing House District, in which the Theurer Norton Company, and Swift & Company, together with the Big Four, are jointly interested.

After the feasibility of the proposition was determined, the Theurer Norton and ourselves, finally obtained a City Ordinance, granting authority to lay the track on a part of the City property, all of which required considerable time, and the interested parties of the proposition are all agreed as to the additions and changes to be made in the track, and the matter has now reached the stage of development where it is status quo, by reason of different interpretations flowing from General Order 15, as modified; it has also been tentatively proposed to settle the expense of maintenance of other tracks that have been installed for several years,
763 but which may possibly be remotely related to the main proposition now under discussion.

The facts relating to the proposed new track are as follows:

The track will begin at a point on the right-of-way of the Big Four and will operate over a right-of-way granted by the City of

Cleveland, and does not strike the property of the shipper until it reaches the Theurer Norton, a distance somewhat in excess of 1,063 feet, on which strip there will be no cars loaded or unloaded, and will be used strictly as a main to reach the Theurer Norton property.

We are interested by reason that under the present track arrangements, the Theurer Norton people are served through a track which this company uses as a loading and icing track, principally an icing track, directly beneath our building, and the business in this territory has increased with such rapidity in the last three (3) years, that the present track facilities are inadequate generally to properly take care of the business without interference in icing and loading, and considerable delay by reason of switching necessary to clear the present track, at least to the Theurer Norton property, so as the Theurer Norton plant may be switched.

The main point at issue is the question of division of expense, as between the carriers and the shippers, which is contingent upon
the application of General Order 15, as modified, and
764 it is the contention of the Theurer Norton and Swift & Company, that the rails in the proposed project will operate over the Railroad property (which belongs to the carriers so long as it is used for Railroad purposes), for a distance of approximately 1,063 feet, where it finally strikes the Theurer Norton property, and therefore, the expense up to the clearance point where the tracks reach the Theurer Norton property, is an expense to be borne by the carriers under General Order 15.

The complications arising from the different views as to the manner in which the General Order 15 is to be applied, prompts us to write you the facts, together with our views on the subject, in hopes that the work of installing the tracks will be hastened and be ready for use before the heavy killing season is reached.

In the event of a prolonged discussion concerning the expense angle of the subject, it is our recommendation that the actual work of laying the tracks be started, and when the controversy reaches a stage of agreement, we can then arrange an actual financial settlement, on whatever basis is jointly agreed to between the
shippers on the one hand and the Big Four on the other.
765 There is no controversy between the percentage of expense to be borne between the Theurer-Norton and Swift & Company, but the sole issue is between the shippers on the one hand and the Big Four on the other.

Please reply.

Yours respectfully,

SWIFT & COMPANY.

Trans. Dept.
HLG: MS.

Per H. L. GALLEN.

766 *Exhibit No. 60*

54

JULY 7, 1919.

Track changes, Clevd.

Mr. H. L. GALLAH,
Traffic Mgr., Swift & Co.,
Cleveland, Ohio.

DEAR SIR: Your letter of June 18, file 1379:

I have had this matter investigated and find that yourself and the Theurer-Norton Company desire some track changes, which, on the present plans, involve the construction of an additional track, to be known as No. 4, about 1,233 feet long, and the shifting of some tracks with a cross-over track, to be known as No. 3, 220 feet long, involving an expenditure of $6,550.

Under General Order 15 and supplements, the railroad cannot justify the Director General paying any portion of this expense. These tracks are purely for the benefit of the concerns mentioned, and the major benefit is for Swift & Company, who, by reason of these changes, expect to enjoy the full use of track No. 2. We understand Theurer-Norton agree to assume their proper proportion of this expense, but your people are expecting the railroad and Theurer-Norton to assume practically all the expense. This is a matter that will have to be decided between you people. The Administration will be very glad to do the work at your expense.

Yours very truly,

E. M. COSTIN, *Federal Manager.*

767 *Exhibit No. 61*

SWIFT & COMPANY
Union Stock Yards
CLEVELAND, O.

JULY 16th, 1919.

Personal.

Mr. E. M. COSTIN,
Federal Manager, C. C. C. & St. L. R. R.,
Cincinnati, Ohio.

DEAR SIR: We have your letter of July 7th, subject Track Changes Cleveland, and in response thereto we may properly state that the information upon which some of your letter is based is not entirely correct as the attitude of the Theurer-Norton Company and Swift & Company is uniform, and we have

suggested to the Theurer-Norton Co. to go on record that such is the case.

We also differ entirely with the statement that the benefit is confined to the shippers, chiefly Swift & Company. It is our opinion that the initiative in this particular case should have been on the part of the railroad instead of the shippers, as it is largely a case of switching facilities and not sidetracks that brought up the question originally, and the proposition still remains a question of switching facilities, and if the carriers are able to switch the Theurer-Norton plant in less the time it now takes, most assuredly it cannot be stated that the railroads are receiving but minor benefits. In fact, in our judgment, the carriers will be benefited more so than the shippers, as speaking, for Swift & Company, we do not now and will not after the proposed tracks are installed, enjoy full use of track No. 2 for the reason that there are other in-
768 dustries being served by this track which the new track will not reach, but we admit some benefit by reason of our loading not being disturbed as often as it is now, but invariably the Theurer-Norton plant is switched about the same time switching is performed at our plant, so manifestly the benefits accruing to Swift & Company are not as great as one might anticipate. However, we are interested generally in the enlargement of the track facilities serving the packing plants, and it is a common knowledge to all those familiar with the track lay-out that some improvement should be made wherever possible so as to properly take care of the present business and then keep in step with the increased production, and therefore increased shipping, of the industries.

We write this without any thought of criticism on the part of the carriers as the switching lay-out was originally forced upon the carriers and the shippers served by the present tracks, and, therefore, neither the shippers nor the carriers are at fault, but it is our position that wherever the situation can be improved upon appropriate action should be taken in the premises.

It is our understanding that General Order 15 would permit the carriers to install at their own expense the switch lead on your own right-of-way, which in this particular case involves a distance of about 1,063 feet, providing the business is sufficient, and undoubtedly the business is sufficient.

The track laid beyond 1,063 feet will be utilized more or less by the Theurer-Norton people and the expense of installa-
769 tion for the changes and etc. beyond 1,063 feet will be absorbed by the shippers.

This, in our judgment, would be in keeping with a sane business policy on the part of the participants, and trust you can be prevailed upon to acquiesce in this arrangement.

Permit us to reiterate what was stated in our previous communi-

cation to you in reference to delay in connection with the matter under discussion; namely, if we are entering a prolonged discussion delaying the execution of the physical phase of the subject, it is our recommendation that material be placed on the ground and that actual work be started, by which time, undoubtedly, some agreement will be reached dealing with the expense phase of the subject.

Please reply.

Yours respectfully,

SWIFT & COMPANY,
Per H. L. GALLEN.

Trans. Dept.
HLG:D.

772 Before the Interstate Commerce Commission

Docket No. 28714

SWIFT & COMPANY, COMPLAINANT

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., DEFENDANTS

Reporter's transcript of oral argument

HEARING ROOM "B,"
INTERSTATE COMMERCE COMMISSION BUILDING,
Washington, D. C., Friday, June 4, 1943.

The above-entitled matter came on for oral argument before the Commission at 10 a. m.

Present: Comissioners Alldredge (Chairman), Aitchison, Porter, Mahaffie, Miller, Splawn, Patterson, and Johnson.

Appearances: R. D. Rynder, 4115 Packers Avenue, Chicago, Illinois, for complainant. Robert R. Pierce, 1324 West Third Street, Cleveland, Ohio, for New York Central Railroad Company and other Cleveland carriers. C. B. Heinemann, 701 McLachlen Building, Washington, D. C., for The Cleveland Union Stock Yards Company.

774 PROCEEDINGS

Chmn. ALLDREDGE. No. 28714, Swift & Company against The Baltimore & Ohio Railroad Company, et al.

Mr. PIERCE. Mr. Chairman, my name is Pierce; I represent the defendant railroad carriers here and I find myself in the position, an oversight having been made, of not having asked for time for argument, and if it is possible that we could be heard we would appreciate it.

Chmn. ALLDREDGE. Are you the only one?

Mr. PIERCE. For the railroad defendants; yes, sir.

Chmn. ALLDREDGE. How much time do you wish?

Mr. PIERCE. 15 minutes.

Chmn. ALLDREDGE. All right. I hope you gentlemen will keep in mind the fact that the Commission's engagements are based upon the amount of time allotted here for argument. It is really disconcerting to us sometimes to have these special requests brought in on us.

Mr. PIERCE. It is wholly an oversight on my part.

Chmn. ALLDREDGE. All right.

What are your initials?

Mr. PIERCE. R. R.

Chmn. ALLDREDGE. Mr. Rynder.

Oral argument of Mr. R. D. Rynder on behalf of complainant

Mr. RYNDER. May it please the Commission, I am repre-
775 senting the complainant and the case is here for argument on exceptions filed by the complainant to the report of the examiner.

I think I have here today a case that is at least interesting and which, after the facts have been sufficiently elucidated, will present to you a rather simple but interesting question of law.

I may anticipate in stating that question in somewhat the following manner:

Whether the lessor of a piece of track, a lessor to a line-haul railroad, the New York Central, which uses the leased track for its general railroad operations, may withdraw the use of that track in the hands of a common carrier and thus bring about what would plainly be violations of the Interstate Commerce Act if the same course of action was pursued by the carrier upon its own track.

In order to make it easier for you to visualize the situation I have placed here very roughly some lines which show the track locations.

A more accurate setting forth of these tracks, and so forth, is found on, I believe, exhibit 1 in this case.

At Cleveland, Ohio, coming along in an easterly and westerly direction, we have here what I may call a main line of the New York Central, owned and operated by the New York Central. Upon that main line at approximately the location I have marked here are three packing-house plants operating in compe-
776 tition with the Swift plant in the same general neighborhood: the Cleveland Provision Company, the Lake Erie Dressed Beef Company, and the Ohio Provision Company.

Running off from the track of the New York Central, at which I am now pointing, and which serves the tracks of these three packing-houses we have 132 feet of track owned by the New York Central, along track 245.

Then for a distance of 1,619 feet the track is owned by The Cleveland Union Stock Yards Company and leased to the New York Central.

At the end of that 1,619 feet we come again to track owned and operated by the New York Central and at approximately the point I have marked a sidetrack comes out, which comes around in somewhat this direction to the plant of Swift & Company, which is across the street from the stockyards property.

Commr. PORTER. Pardon me. Is the stockyards itself in about where that track is, Mr. Rynder?

Mr. RYNDER. I think Mr. Pierce will correct me if I am wrong, but I would put the stockyards—the line of the stockyards property would be about the line I am putting it. Wouldn't it?

Mr. PIERCE. The street line?

Mr. RYNDER. The street line.

Would this be 65th street?

Mr. PIERCE. 63d.

777 Mr. RYNDER. 63d Street. And the line of the stockyards property, as I understand it, comes to the east side of 63d Street.

Commr. MILLER. West side, if your compass is right.

Commr. JOHNSON. West side.

Mr. RYNDER. The west side of the street, but the east side of the property. The west side of the street.

The Swift & Company property is on the opposite side of the street from the stockyards property.

That is the physical lay-out.

One point that I would like to emphasize in connection with that is that the 1,619 feet leased from the stockyards forms no part of the Swift & Company sidetrack, to which I am directing your attention now.

The Swift & Company sidetrack connects with the industrial track and has nothing to do with the 1,619 feet owned by the stockyards.

Commr. MILLER. But it is leased by the New York Central; is it not?

Mr. RYNDER. Yes, sir; leased by the New York Central from the stockyards.

For many years—I cannot tell you how many—the New York Central delivered over this track to the Swift & Company plant all classes of freight, including livestock. What the origins of the agreements were or just what they were I do not

778 know, although I have made a diligent effort to find out.

In 1928, I believe, those agreements—and, by the way, we have had our plant there since 1905—in 1928 there was a lease made by and between the parties which on its face shows that it was simply a continuation or reduction to writing of former agreements which may or may not have been written. That lease in its entirety appears at page 21 and following pages of the opening brief.

In 1935 the stockyards company insisted, I guess to the railroad company, upon modifying that lease so as to provide that this 1,619 feet of track could not be used for what they called competitive traffic.

However that may have been, the railroads in 1938 modified their tariffs so as to provide that livestock would not be switched by the New York Central to the Swift & Company plant.

There were a number of things which intervened, and presently we filed a complaint seeking to have that service restored.

Since 1938, November the 12th, the New York Central has refused to deliver livestock to the complainant's track and the complainant's plant over these tracks and there is no other way of reaching the plant.

It has continued to deliver and take from the plant all other classes of traffic, but, obviously, if the stockyards can stop the delivery of livestock over that track it can exercise the same

179 powers as to all other traffic and, if it was so inclined, could close the plant, for a plant of that kind cannot operate without rail connection.

Commr. MILLER. Do you get the livestock in now?

Mr. RYNDER. Sure.

Commr. MILLER. Do you get any livestock in now?

Mr. RYNDER. Because it cannot be delivered to our plant it must all be delivered in the stockyards and then we have to get it through the stockyards facilities, bringing it back across the street to the plant.

Commr. MILLER. Drive it in?

Mr. RYNDER. Yes, sir.

Commr. MILLER. On the hoof?

Mr. RYNDER. On the hoof.

Commr. MILLER. Yes.

Mr. RYNDER. And in a decision of your Honors that reached me just about a week ago, in No. 28421, you have held that the shipper of livestock at Cleveland is not entitled to cross without extra charge, so I assume that with the effective date of that order we will not only have to take delivery of the livestock in the stockyards but will have to pay a yardage charge in order to get it out and across the street.

I hardly believe that the defendants will disagree with me if I suggest that but for the nonownership of this track by the New York Central we would have here a clear violation of certain provisions of the Interstate Commerce Act.

780 In other words, we would have violations of the Interstate Commerce Act that would never have been effected by the railroads had the property belonged in its entirety to the railroads.

First, we have been deprived of a customary and usual delivery which had been made for many years, and which, I belive, without some valid excuse, would be a violation of section 1 (3) of the act.

Secondly, ——

Commr. PATTERSON. Was there ever a time when you brought all of your livestock into the Swift plant by rail?

Mr. RYNDER. There has never been a time when we brought all of it in; no, sir.

Commr. PATTERSON. You have always used the stockyards?

Mr. RYNDER. For a part of it.

Commr. PATTERSON. What facilities do you have in the plant for handling livestock?

Mr. RYNDER. Adjacent to this track we have at present eight large pens, but, as the record shows, and the oral testimony, the land in the general direction south of this track is substantial, and is owned by Swift & Company, and is vacant—the land immediately between the stock pens and the south.

Commr. PATTERSON. Have you always had eight pens in there, since 1905?

Mr. RYNDER. Sir, I am not sure about the exact number

781 of pens.

Commr. PATTERSON. Well, have you increased the facilities there quite recently for unloading livestock in your plant?

Mr. RYNDER. Certainly not since we could not get it delivered. I am merely pointing out that if we can get a delivery of livestock at our plant we need only to build more pens in order to increase indefinitely the amount that we can take at our plant.

Commr. PATTERSON. Well, do you drive your livestock now across the street, into those eight pens?

Mr. RYNDER. I think that probably under present conditions we drive the livestock that has to be delivered in the stockyards directly into the portion of the plant where it is to be slaughtered. The pens are primarily for holding the stock until you can drive it to the slaughter floor.

Commr. PATTERSON. That is the same use to which you put the stockyard company's pens for some time past?

Mr. RYNDER. For some time past.

Commr. MILLER. That New York Central line from your switch;

where does that get back into the connection with the New York Central again?

Mr. RYNDER. This is the New York Central, sir.

Commr. MILLER. Yes; but does that connect onto the main
782 line so they could deliver stock cars to you?

Mr. RYNDER. No, sir.

Commr. MILLER. Without going to the stockyards?

Mr. RYNDER. No, sir; they would have no means of bringing it around to the south here.

Commr. MILLER. It goes to a dead end, that branch; does it?

Mr. RYNDER. I believe that is a dead-end line.

Commr. MILLER. Oh, yes; I see.

Mr. RYNDER. And the livestock has to be brought in over the main line, coming up in this direction.

Commr. MILLER. And has to go across that 1,619 feet?

Mr. RYNDER. It has to cross it. As I understand it, there is no other means of reaching our plant than this track 245, of which 1,619 feet is owned by the stockyards.

I do want to make the point, if I have not sufficiently made it, that we would have here a clear violation of the Interstate Commerce Act, unless there is a valid excuse.

For one thing, the railroads would be depriving us of a customary and normal delivery that they have been making for many years.

Second, there would be a discrimination between commodities, because the railroads now take in to our plant and take from our plant everything necessary for its operation, such as supplies,
in-bound coal, lumber—everything of that kind, and
783 meat products out-bound; everything except livestock. We have a commodity discrimination there.

The record is undisputed about the point that, using their own facilities, the railroads switch livestock to the three competitive packing plants, just as they switched it formerly to our plant, so that you have a discrimination under section 3 as between three competing plants.

And the examiner finds the facts as I have stated them with respect to those three plants.

Commr. PATTERSON. Did you answer my question as to whether the facilities in the plant for storing livestock have been increased since this controversy arose?

Mr. RYNDER. Have been increased?

Commr. PATTERSON. Yes; the storage for livestock within your plant.

Mr. RYNDER. Sir, my impression is that they have remained the same; but I am not sure whether the record has any testimony on that.

Mr. PIERCE. I think the record is silent on it.

Mr. RYNDER. I think the record is silent on it, probably, but my impression is that it has remained the same.

Commr. MILLER. Who furnishes the unloading pens on the New York Central to these three competitors?

Mr. RYNDER. The industries, as I understand it.

Commr. JOHNSON. They have private sidings?

784 Mr. RYNDER. They have private sidings; each one of them has a private siding to unload upon, just as we have a private siding to unload upon.

Commr. JOHNSON. How much right-of-way does the New York Central own on its main line?

Mr. RYNDER. I do not know; Mr. Pierce may.

Mr. PIERCE. About 100 feet wide.

Commr. JOHNSON. Over all?

Mr. PIERCE. 50 feet on each side.

Commr. JOHNSON. 50 feet on each side?

Mr. PIERCE. I think that is right. There are four main tracks in there, Mr. Commissioner.

Commr. JOHNSON. These industries have private sidings which connect with the main line of the New York Central?

Mr. PIERCE. There is a direct connection.

Mr. RYNDER. So, I say that we have a prima facie case at least of violation of the Interstate Commerce Act and the question of whether or not an excuse exists because this 1,619 feet is leased by the New York Central from the stockyards.

The examiner, I think, finds all of the facts that I need for my case, but dismisses the complaint solely upon the ground of non-ownership of the track by the New York Central.

On sheet 3 of the proposed report the examiner says:

"Defendants cannot transport livestock to complainant's siding except by using track No. 245. Under the circumstances described"——

785 Parenthetically, that is just as I have described it—"the line-haul defendants are under no obligation to transport shipments of livestock to the sidetracks at complainant's plant."

The examiner does not discuss whatever law there may be on one side or another of that proposition.

Now, my point is that the examiner has failed to consider the definition of a railroad in section 1 (3) of the act, which provides:

"The term 'railroad' shall include all tracks in use by any common carrier"——

And this track is in use by a common carrier. And then: "whether owned or operated under a contract, agreement, or lease."

* * * "whether owned or operated under a contract, agreement or lease"!

This 1,619 feet is not owned but is "operated under a contract, agreement, or lease"; the New York Central having obtained it in that way, it has, by the definition in section 1 (3), become a part of the New York Central Railroad and, as I contend, under that section of the act it becomes a part of this railroad which may not be used unlawfully to discriminate in violation of other sections of the act.

Chmn. ALDRICH. Your position, then, is that that is not a private siding for the service of the stockyards but has been
786 dedicated to public use and is a part of the railroad facilities; is that right?

Mr. RYNDER. I think Mr. Pierce will agree with me that it is not a part of the private siding to the Swift plant.

Mr. PIERCE. It is the missing link between the New York Central and the Swift track.

Mr. RYNDER. And it intervenes between two what I might call public tracks.

Commr. PATTERSON. Does the New York Central serve any other industries except Swift over this particular track?

Mr. RYNDER. Another small packing plant adjacent to our plant.

Commr. MILLER. Is that the only purpose of that 1,619 feet? To get through there? Is that track used for any other purpose except to get over to your siding?

Mr. RYNDER. I am not informed as to what other uses the New York Central may make of it, if any.

Commr. MILLER. But was it used for stockyards purposes?

Mr. RYNDER. I know from looking at it that it could be; whether it is or not I will have to leave to the defendants.

Mr. PIERCE. Well, I can answer that question.

Cmmr. JOHNSON. Is that other small plant down there receiving livestock over No. 245?

Mr. RYNDER. Not since the deliveries have been stopped. We understand that it did before that time.

787 Commr. JOHNSON. Not since that time? When Swift & Company failed to receive livestock they failed to receive livestock?

Mr. RYNDER. Yes, sir.

The sidetracks serves both plants in and out with everything except livestock now.

The first exception I have noted, in addition to the one as to the definition of a railroad, is that the examiner erred in failing to note that The Cleveland Union Stock Yards Company is a defendant to the complaint and in treating the complaint solely as if it was directed against the line-haul carriers. In the second sentence of the report the examiner says:

"It is alleged that the failure and refusal of the line-haul de-

fendants to deliver carload shipments of livestock" and so forth.

At the time I drafted this complcint I knew pretty well the facts that have been brought out would be brought out and I made the stockyards company a defendant at that time, knowing that, knowingly and willfully. I believed that I had a right to do that under section 2 of the Elkins Act, which provides, in substance, in any proceeding for the enforcement of provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Commission or in a District Court, it shall be lawful to include as parties all persons interested in or affected by the regulation or practice under consideration,
783 and orders may be made with reference to and against such parties in the same manner and to the same extent and subject to the same provisions as are or shall be authorized by law with respect to carriers.

I have cited in my exceptions all the cases I could find decided under that section of the Elkins Act; you will find them at page 12 and a couple of pages following of my exceptions.

I believe they amply support the proposition not only that The Cleveland Union Stock Yards Company, the party here preventing this delivery, is a proper party defendant—and I made it a party defendant—but also that the Commission may make any order against The Cleveland Union Stock Yards Company necessary to prevent a violation, a clear violation, of the various sections of the Interstate Commerce Act.

You were upheld in making, for one thing, an order of that kind against a carrier which had ceased to be a carrier and sold its property before you made a reparation order. In the Spencer-Kellogg case Spencer-Kellogg, neither a receiver nor a shipper of the traffic involved, was enjoined from making itself the avenue for a rebate although it was not a common carrier by railroad and was not the shipper of the property involved.

I desire particularly to emphasize that point because I believe that you have the power here to make an order requiring conformity with the provisions of the act not only against the
789 New York Central but also against The Cleveland Union Stock Yards Company as the owner of this track and as a party defendant which has required its codefendant to violate the act.

Commr. MAHAFFIE. Could we prevent The Cleveland Union Stock Yards Company from removing the track?

Mr. RYNDER. Well, that is a question we do not have to face in this case.

Commr. MAHAFFIE. I thought it was somewhat analogous to directing the use that it might permit to be made of it.

Mr. RYNDER. I have some ideas upon that, Mr. Commissioner.

I believe that that track has been dedicated to a public use for so many years that the stockyards has lost the right to treat it as its own property. That would be upon the theory of dedication.

I have searched those cases pretty well. I have mentioned some of them in my exceptions and one of them says distinctly that a dedication of property for station purposes for a certain period prevented that owner from taking back the property and selling it.

So, to answer the technical question, I believe it could not be done, upon the theory of dedication to public use; but we are not quite up to that point in this case because the stockyards has not withdrawn the use of this track. It is still under lease to
790 the New York Central and what might happen if the stockyards withdrew the use of that track completely would be another chapter.

Commr. MILLER. But they have put in a condition as to how it should be used or for what purpose, in their contract: that it cannot be used for hauling livestock.

Do you contend that they cannot put the condition in?

Mr. RYNDER. That is what I am contending.

Commr. AITCHISON. In other words, that contract has stamped in red ink all over its face that the subject-matter of this contract is being regulated by page 1, title IL, of the United States Code, and it is distinctly understood by all parties that all terms and conditions of this contract are subject thereto.

Mr. RYNDER. You have stated it much better than I could, Mr. Commissioner.

Commr. JOHNSON. Do you contend that an owner who leases his property for postoffice purposes could not after 20 years refuse to lease it further on the theory that it had been dedicated to public use?

Mr. RYNDER. I am not sufficiently acquainted with the postoffice statutes.

Commr. JOHNSON. Well, you are talking about dedication to public use.

Mr. RYNDER. I am, sir.

Commr. JOHNSON. Do you contend an owner cannot pro-
791 hibit the using of his property for public use when he rents it to another man, who dedicates it to public use under a contract? That is permissible; isn't it?

Mr. RYNDER. Not necessarily.

Commr. JOHNSON. Would you think it a proper condition that the owner of property leased to the post office would attempt to put a clause in the contract that the Government could not transport newspapers through that office?

Mr. RYNDER. Well——

Commr. AITCHISON. Well, couldn't it?

Mr. RYNDER. I would say that if he leased that property to the post office for post office purposes and then said, "Mr. Postmaster, you cannot deliver any more through this post office to R. D. Rynder," he would step beyond the bounds of what he could do.

Commr. JOHNSON. But he could enforce it when the lease matured.

Mr. RYNDER. I don't believe he could.

Commr. JOHNSON. He could refuse to rent in in the future.

Mr. RYNDER. Oh, you mean after his lease expired.

Commr. JOHNSON. Sure.

Mr. RYNDER. Well, I think we have not reached that point here.

Commr. JOHNSON. Well, then, suppose the Government agreed to the condition being put in the lease even before maturity.

792 Mr. RYNDER. I hope you will excuse me, because I am getting too far afield and I need my time.

I believe all the authorities support me in the proposition that the use of this property is a public use by the railroad.

One of the leading authorities on that is Union Lime Company v. The Chicago & North Western, 233 U. S. 911. I do not need to quote that to the Commission except to state that it was a case where the railroad was trying to take by eminent domain private property for use as a spur track. You will find it quoted at pages 19 and 20 of my exceptions.

The Supreme Court held that such use of the property was a public use and that the land could be condemned for that purpose.

Upon that, too, we have cases from various supreme courts of the various States, practically all to the same effect. I have quoted several of them in my exceptions and will not take your time now to read them, but I would like particularly to call your attention to the decision in Morgan Run Railway Company v. Public Utilities Commission, 120 Northeastern, 295, because that case was decided by the supreme court of Ohio, the State in which this particular track is located; and I believe it presents a factual situation so similar that it would be a strong authority in my favor in this case.

The statute under which the case was decided is quite similar to the Federal statute in its definition of a railroad;

793 and that court said in its conclusion:

"Again assuming, for the purposes of this case, that the coal company owns the portion of the railroad claimed by it"—Just as the stockyards here—"and that the coal company itself made up the deficiency in the cost of operating the railroad, still the railway company has no right to make the discrimination found by the commission to be made. It is not a question as to the

right of the railway company to take and use the lands or property of the coal company without consent and without compensation. It is a question as to the right of a corporation, having all the rights and subject to all the duties and obligations of a common carrier, to operate its own line for the exclusive benefit of the coal company and to use the coal company's line over the coal company's property with its consent to transport its coal to and over the company's railway line, all to the exclusion of the general public or those who have the right to equal shipping privileges.

"We therefore hold that as long as the railway company operates any portion of the railroad in question it must do so without discrimination in favor of any shipper. This is a small and unimportant railroad, whose operations are very limited; but the questions that are brought into court for consideration are not limited. They affect every common carrier. If this
794 company may arbitrarily select those whom it will serve any company may do so."

Now, in the remainder of my exceptions I have gone into some of the cases dealing with dedication to a public use. I believe that is going further than I need to in this case, for we aren't faced yet by any action by the stockyards of withdrawing this track from use except for the transportation of livestock.

Chmn. ALLDREDGE. Do I correctly understand—Have I a correct understanding of your case, that it turns on the question of dedication?

Mr. RYNDER. I do not think so.

Chmn. ALLDREDGE. You do not think so.

Mr. RYNDER. I do not think we have reached that point yet because the stockyards is not withdrawing the track from railroad use; it is saying to the railroad, "You may continue to use this track but you may not use it to switch livestock to Swift & Company."

Chmn. ALLDREDGE. What I have in mind is whether or not that track in there has been subjected to public use to such an extent that it becomes not a private sidetrack but a part of the New York Central Railroad. Is that right?

Mr. RYNDER. That is my contention, sir.

Chmn. ALLDREDGE. So, in that sense, you contend that the track has been dedicated to a public use.

Mr. RYNDER. Yes, sir.

795 Chmn. ALLDREDGE. And, having been so dedicated, it must be used nondiscriminatorily; is that right?

Mr. RYNDER. That is true, sir.

Chmn. ALLDREDGE. It would be different if it were a purely private sidetrack?

Mr. RYNDER. Well, if we were dealing with the private side-

tracks to the Swift plant instead of a part of what I shall call a general terminal facility of the New York Central, yes, I think we would have a different case.

Commr. PATTERSON. Do you think the New York Central would require authority from this Commission to take that track out?

Mr. RYNDER. Sir?

Commr. PATTERSON. Do you think the New York Central would require authority from this Commission to take that track out?

Mr. RYNDER. I think it would be an abandonment, if we had reached that point; it would require permission, I think. But, as I understand, your cases on abandonment do not go generally to cases like this, but simply where a complete operation has been suspended.

Chmn. ALLDREDGE. Well, that track 245, and particularly the segment of it on the stockyards property, if it were considered a part of the sidetrack the same as the Swift track and the tracks serving those other packing plants, then you would not contend, would you, that the stockyards company could not condition its use to somebody else?

796 Mr. RYNDER. Oh, if it were a private sidetrack I fancy we would not have this case at all; if it were a private sidetrack I fancy we would be leasing it from the stockyards.

Chmn. ALLDREDGE. Could you state how long that track has been in there serving the parties it is now serving?

Mr. RYNDER. I do not know, sir, but we purchased that plant—and everything was there at that time—in 1905. How long it may have been there before that I do not know.

Chmn. ALLDREDGE. Well, track No. 245 was in operation at that time?

Mr. RYNDER. Yes, sir.

Commr. PATTERSON. This other little plant that is down beyond your plant is not in here complaining; is it?

Mr. RYNDER. No; he has not. And I have heard, although it certainly is not in this record, that he was sort of squeezed out of existence by ceiling prices.

Mr. PIERCE. On that I am not informed, Mr. Rynder.

Mr. RYNDER. Neither am I. That is just a rumor and not in the record.

Commr. ATTCHISON. Are you asking us to proceed under our power under section 1, paragraph 9?

Mr. RYNDER. Oh, in my opinion, I think that is not involved here because our connection has been made with the New York Central and there seems to be no question as to the desire

797 or willingness of the New York Central to serve us if it may do so.

Commr. ATTCHISON. Well, may I call your attention to this——

Mr. RYNDER. Sir?

Commr. AITCHISON. May I call your attention to this section 1, paragraph 9, again, because it relates to the furnishing of cars for the movement of traffic without discrimination?

Mr. RYNDER. I may be wrong, Mr. Commissioner, but I had assumed that that applied to a situation that had already been——

Commr. AITCHISON. Well, read the second part: "If any common carrier will fail to install and operate any such switch or connection" and so on and so forth, "such shipper may make complaint to the Commission" and we have power under section 13.

Mr. RYNDER. I believe we could have done that if that set of facts was there, in order to put in the sidetrack, but the sidetrack is there.

Commr. AITCHISON. Well, they are failing to operate it.

Mr. RYNDER. They are failing to operate it with respect to livestock.

Now I should like to save what time I have for reply and to conclude this argument merely with a brief summary of what I have already stated:

The 1,619 feet we are talking about is, under the Interstate Commerce Act, included within the definition of a railroad
798 and so long as the railroad leases it it must be operated without discrimination and in accordance with the performance of its customary duties.

Under the Union Lime Company case the use of this track makes it a part of the carrier's terminal facilities and not a part of any sidetrack or private sidetrack and subject to such orders for conformity with the law as this Commission may make.

The mere fact that this part of this track, which, so far as a shipper is concerned, is a part of the main-line track, is leased from an individual affords the railroad no excuse for discrimination in service over that track.

Lastly, if the question should be reached, that that track has through these many years been dedicated to a public service and cannot be withdrawn.

I thank the Commission.

Chmn. ALLDREDGE. I wish you would, during the interval here, give some thought to the question asked you by Commissioner Aitchison, whether or not your complaint does not finally center on the refusal to give you switching service over this track, this private sidetrack, under section 1 (9).

Mr. RYNDER. Well, we have the physical connection; we do not have to apply for the physical connection under section 1 (9).

Chmn. ALLDREDGE. But they refuse to service your plant as to livestock.

799 Mr. RYNDER. And if the question arises in your delibera-

tions I believe you will find that our complaint is broad enough to ask for it, to ask specifically for the restoration of this switching service for livestock.

Commr. AITCHISON. You do not have to mention the part of the act.

Mr. RYNDER. No, sir. That is the point I am trying to make: that our complaint is broad enough to cover that if you believe that it falls within that section.

Chmn. ALLDREDGE. Mr. Heinemann.

Oral argument of Mr. C. B. Heinemann on behalf of The Cleveland Union Stock Yards Company

Mr. HEINEMANN. Mr. Chairman and gentlemen, I appear on behalf of Mr. Baker, counsel for The Cleveland Union Stock Yards Company. Mr. Baker came down here yesterday under the misapprehension that his argument was yesterday, and, having previously made arrangements to go to Chicago, he has asked me to substitute for him and present his argument here today. I know that I cannot do it as well as Mr. Baker but I shall do the best I can under the circumstances.

The Cleveland Union Stock Yards Company is the owner of certain land and tracks, particularly the track designated as track No. 245, which has been used by the New York Central Railroad in switching freight to and from the plant of Swift & Company in Cleveland.

800 The use of this track was granted to the railroad under an industry-sidetrack agreement dated June 16, 1924, and under an amendment effective February 1, 1935.

Now, had I been drawing this map or plat Mr. Rynder has on the board here, I think I would have drawn it a little bit differently, for it swings around and this track runs almost due south to the Swift & Company plant, and that plant is between 63d and 65th Streets.

That, however, is immaterial.

As I say, the use of this track was granted to the railroad under an agreement dated June 16, 1924, and unquestionably that agreement succeeded an earlier agreement, of which we have been unable to find any copy.

Commr. JOHNSON. It was an original lease? For what term was it leased?

Mr. HEINEMANN. The 1924 lease was a lease under an arrangement whereby it continued in effect until either side gave notice.

Commr. JOHNSON. Until either side gave notice to terminate?

Mr. HEINEMANN. That is right, sir.

Now I think the Commission can and has taken judicial notice

of the fact that in the earlier years, particularly in the earlier years of the Commission, the matter of sidetrack agreements
801 was more or less entirely out of uniformity and in some cases they had them and in other cases they did not have them.

The Commission has undertaken to correct that situation and I think as a result of their efforts this was possibly one of the cases where they reduced to writing earlier agreements and more or less written agreements, some of which were far from complete.

Commr. JOHNSON. Who gave notice in this instance which was the inception of this matter?

Mr. HEINEMANN. The Cleveland Union Stock Yards Company, sir, the owner of this track about which we are talking.

Commr. MILLER. Did this new agreement have the same expiration date?

Mr. HEINEMANN. The new agreement may be terminated on notice; yes, sir.

Commr. JOHNSON. From either side?

Mr. HEINEMANN. Yes, sir.

The stockyards company owns no motive power and performs no services in connection with the movement of cars of freight over this track to or from the Swift plant.

The examiner has proposed a report which, with the proposed findings, is supported by the facts.

None of the defendants filed exceptions to the proposed report. The complainant has filed exceptions based in part upon its construction of certain statements in the proposed report
802 which, perhaps, should be clarified.

Now I may state that the Livestock Terminal Service Company was a party defendant but it has never had the slightest to do with our tracks; they were not leased to it; they were not owned by it; they have never been used by it.

On sheet 2 of the proposed report the examiner says: "No agreement as to the amount of charge (for the use of the tracks for livestock) was reached."

And again, on sheet 3, in the last paragraph: "There is no agreement permitting its (track No. 245) use by the line-haul defendants for the transportation of livestock."

And still further, on sheet 4, in the first paragraph: * * * "Its use to transport livestock is not allowed."

And in the last paragraph of sheet 4: * * * "the evidence definitely shows that the line-haul defendants are not permitted to use the only track over which it is physically possible to deliver shipments of livestock to the siding of complainant's plant."

While it may be that there was no formal, written agreement as

to the charges for the use of the track in question for delivering livestock to complainant's plant it cannot be said that the use was not permitted or allowed.

These are the facts:

The track in question was used by the New York Central
803 Railroad during the period from June 16, 1924, to November 12, 1938, for delivering livestock to complainant's plant.

The sidetrack agreement of June 16, 1924, under which the track was used, provided for the free and uninterrupted use of the track by the railroad upon certain specified considerations and also provided for termination of the use upon 30 days' written notice by either party.

On December 3, 1934, the stockyards company advised the railroad of its purpose to limit the free use of the track to traffics not competitive with the company's business and in accordance with the provisions of this agreement notified the railroad of the termination of the agreement 30 days after the date of the letter.

In the same letter the stockyards company made the following offer:

"After the termination of 30 days on any livestock handled direct to the unloading chutes of slaughterers in Cleveland over the tracks and/or land of this company we will charge and expect you to pay us the charge named in our tariff No. 5 applicable to livestock consigned direct to packers and not offered for sale; which charge is at present:

"20 cents per head on cattle,
"12½ cents per head on calves,
"7½ cents per head on hogs,
"5 cents per head on sheep."

804 On January 11, 1935, the stockyards company reiterated its offer, which has never been withdrawn.

Effective February 1, 1935, 30 days after the notice of termination, the agreement of June 12, 1924, was amended so as to grant to the railroad the free and uninterrupted use of the track "except for competitive traffic, a charge for which use shall be the subject of a separate agreement."

So far as the stockyards company is concerned, it has had since February 1, 1935, a continuing offer to permit the use of this track for delivery of livestock upon the payment of the specified charge.

In other words, Mr. Commissioners, the stockyards company has not refused to permit the deliveries of livestock over this track.

The complainant has prepared and filed a very novel exception to the examiner's proposed report; counsel has based his argument upon the assumption that the track owned by the stockyards company could not be used by the railroad under any circumstances.

As a matter of fact, the record shows that the only thing that was not permitted was the free use of the track, for delivery of livestock.

Complainant in its introductory statement states that the stockyards company notified the railroad defendants that the track owned by the stockyards company might no longer be used
805 to transport livestock to complainant's plant. As has been pointed out, no such notice was given.

It is appropriate to note here that the use of this track by the New York Central Railroad did not end on the effective date of the notice, February 1, 1935, but continued for more than three years longer, until terminated by the action of the railroad in amending its tariff.

On page 8 complainant makes the novel claim that the actice of The Cleveland Union Stock Yards Company in granting the use of a switch track to the New York Central Railroad for a specified consideration named in a sidetrack agreement constituted dedication of this track to the public use and that The Cleveland Union Stock Yards Company may not dictate and enforce upon the New York Central an unlawful discrimination in the use of the track or prevent the use of the track by the New York Central in performance of the service customary and required by law.

There is nothing in the record indicating such a dedication on the part of the stockyards company. By continuing to furnish transportation service and by the use of this track the railroad company conceivably may have assumed our having imposed upon it an obligation to furnish transportation service to complainant's plant but the railroad company in the past acquired the use of necessary facilities by contract since November 12, 1938.

It might have used the same facilities under the terms of
806 the offer of the owner; and, of course, the railroad has the right of eminent domain, by which it may acquire property necessary for transportation service.

Within the limits imposed by law the owner of the property may dictate the terms of its use but in this case there has been no attempt to enforce upon the New York Central any discriminatory practice or to make it impossible for them to furnish service as complained of.

The record shows, on pages 18 and 57, that the failure to use the track for livestock is due to the fact that the New York Central could not see its way clear to pay for the privilege what the stockyards company is seeking to collect from the railroads, as fixed in the letter from The Cleveland Union Stock Yards Company to the New York Central Railroad.

Commr. MILLER. Why do you call the livestock competitive traffic? You mean competitive with those other packing houses?

Mr. HEINEMANN. No, sir; it is competitive so far as the stockyards company is concerned because it is chartered primarily to operate a market for livestock and livestock which moves on other than its facilities is, of course, treated as competitive livestock.

It must be clear to everyone that the stockyards company did not dedicate a portion of its property to public use when such use could and probably would result in a diversion of a substantial part of the company's business.

807 No one has asserted, prior to this novel claim of the complainant, that this property is public property and available to the public use without compensation to its owner. It is still on the tax duplicates and the stockyards company is still required to pay all taxes and assessments made against said property.

Complainant seeks to appropriate a part of the stockyards property and to have this Commission issue an order to that effect against the stockyards company.

While the complainant alleged that the stockyards company is a common carrier by railroad, the complainant has apparently abandoned that contention and now seeks to cast the stockyards company in the role of a person interested in or affected by the rate regulation or practice under consideration.

Counsel argues that if the Commission is convinced that the stockyards company is imposing a rule that violates a provision of the Interstate Commerce Act the Commission may make an order against the stockyards company as well as against the railroad.

The stockyards company is not interested in or affected by the practice complained of; that is a matter between the complainant and the line-haul carriers.

In the second place, it has not imposed any rule which violates the act; it has not forced the carriers to discontinue services.

808 It has merely sought compensation for the use of its property and it has not denied its use.

The track in question has been described as being in the middle, between two sections of track owned by the New York Central.

The complainant and the line-haul railroads seek to put the owner of that track in the middle; all of them want to use the property and none of them wants to pay for its use.

The stockyards company has been and is agreeable to the use of this property if compensated for the use and for the loss of business occasioned by its use.

Mr. Rynder said that all of his stock must be delivered through the stockyards. As a matter of fact, this record will indicate that

the New York Central has facilities some three miles away from the stockyards——

Commr. AITCHISON. I thought that it was five.

Mr. HEINEMANN. I beg pardon.

Commr. AITCHISON. I thought that it was five.

Mr. HEINEMANN. They may have moved it closer. In any event, they have the facilities of their own and they also have team tracks and deliveries are made from team tracks in Chicago.

The question also arose as to the Swift & Company pens and I think it only fair to state, like the airplane traffic, there was no occasion for insurance against airplane accidents before
809 we had them; there was no necessity of imposing a prohibition against direct shipments of livestock out there when they did not move.

After they started moving, then the occasion for this restriction was there; and then is when this dispute arose. Swift & Company did not have, of course, facilities on direct call, for they didn't need them.

I am not making that as a criticism against Swift & Company but I just simply state the fact.

The question was raised about the use of this track by the stockyards company. It was built primarily, in the first place, incidentally, to serve unloading chutes, which are still there and in use by the stockyards company for the loading-out of small stock, primarily hogs, moving from the stockyards. It is entirely contrary to the thought of the stockyards company and it would be against its interest to abandon the use of the track, serving packing houses such as the complainant operates. Not only is there no thought in their mind of doing this; it is to their interest to encourage the movement of traffic to and from the plant because it is one of its big patrons.

The complainant is saying to this Commission that it shall permit the continued free use of a track of this kind and the stockyards company is receiving no compensation whatever from the railroad or from the railroads whose facilities are reached over the tracks which it owns.

810 Commr. AITCHISON. What compensation do you get when coal is delivered?

Mr. HEINEMANN. Coal?

Commr. AITCHISON. Yes.

Mr. HEINEMANN. None whatever, sir. That is and has been one of the points in dispute. The stockyards company, of course, under their arrangements with the railroad company—The railroad company undertook, as one of its considerations, the maintenance of the track; but I mean so far as compensation for the

investment in the track and in the fee which the company owns under the tracks, it receives nothing.

Commr. ATTCHISON. Well, they do, however, maintain the tracks.

Mr. HEINEMANN. The railroad company maintains the tracks under the terms of that lease; that is one of the considerations, sir.

Commr. ATTCHISON. Well, it is a consideration and a valuable consideration, although, from your standpoint, it might not be considered to be adequate.

Mr. HEINEMANN. Well, of course, the mere maintenance of the track would not yield a thing on the investment.

Commr. ATTCHISON. Well, it keeps it up.

Mr. HEINEMANN. Thank you, gentlemen.

Chmn. ALLDREDGE. Mr. Pierce.

811 *Oral argument of Mr. R. R. Pierce on behalf of the New York Central Railroad Company and other Cleveland carriers*

Mr. PIERCE. If the Commission please, I want to apologize for my oversight in not asking for time. I will try to get through in this 15 minutes.

I do think that it is necessary for the Commission to have a little more correct understanding of the arrangement here.

Chmn. ALLDREDGE. Would you permit me to ask a question before you start?

Mr. PIERCE. Certainly, Mr. Commissioner.

Chmn. ALLDREDGE. Does the record show what kind of a contract you have entered into with Swift & Company concerning the operation of its private siding serving the plant?

Mr. PIERCE. I do not believe that is in the record.

Chmn. ALLDREDGE. Well, you have entered into an unrestricted contract with Swift & Company to furnish service over that private siding to the plant without protecting yourself against any contingency. Doesn't it more or less do that, even going beyond that?

Mr. PIERCE. Well, that would put the onus on the railroad company, I presume, if that were done. But that, as I understand it, is not in the record here at all, as to what the early stages—what did transpire in those early stages here.

812 There was a contract in 1899 between The Cleveland Union Stock Yards Company and the railroad company covering the stockyards track generally. There are a number of tracks over there.

In 1924 that agreement was amended so as to provide that the railroad company would maintain these tracks even though they were owned by the stockyards company, and in return for that the railroad company could have the use of the tracks and of other tracks there which also serve the stockyards enterprise and industries, but that contract was always limited with this 30-day terminating clause; there was always the 30-day terminating clause in the contract between the stockyards and the railroad company for the use of this track 245, as well as the use of all those stockyards tracks.

Chmn. ALLDREDGE. Well, even if that be granted, apparently you have entered into a contract with Swift for the operation of the private sidetrack within its plant.

Now if Swift & Company calls upon you to deliver these cars on that siding down there what excuse have you if you have got into a contractual situation somewhere between that plant and your main line which prevents you from doing it?

Mr. PIERCE. Well, that is not in the record, your Honor.

Chmn. ALLDREDGE. That makes it expensive for you to do it.

Mr. PIERCE. That is not in the record, your Honor. The
813 early stages of the negotiations—There is nothing to show that Swift & Company was not on notice at all times about the fact that this 1,619 feet of track belonged to the Cleveland Union Stock Yards Company.

Commr. PORTER. But is that any defense to you? Suppose they were on notice that there is a private siding up to your lines that does not belong to the New York Central; now, then, between that and the other track there is some private right, we will say. Does that excuse you? Really you are bound under the statute to serve over there.

Mr. PIERCE. Mr. Commissioner, I would like to answer that, if I may, by stating something else first.

Commr. PORTER. Why, sure.

Mr. PIERCE. This is just a sidetrack here that belongs to the New York Central Railroad Company, connecting with this stockyards track, and there are industries over there: there is one coal company over there and there are about five or six industries that are served. This is New York Central track here [indicating].

Chmn. ALLDREDGE. It is part of your terminal facilities, part of your railroad.

Mr. PIERCE. Well, I would say this disconnected track there, that is, with the stockyards track——

Chmn. ALLDREDGE. And you have entered into a contractual arrangement with them. In other words, they are on that
814 track and they are served by it and you have permitted a

condition to exist between that part of your track and your main line which may at any minute interfere with your ability to live up to these other contracts.

Mr. PIERCE. I do not think so, Mr. Commissioner, and for this reason: This record is not complete with reference to the conditions that prevailed with reference to the other sidetracks that are served by the use of this 1,010 feet nor is the earlier stockyards agreement in here. Is that correct, Mr. Rynder?

Mr. RYNDER. That is what I rose for a moment ago, and I would just like to say this by way of explanation: I asked to have an exhaustive search made to see what the early arrangements were and we solicited the aid of the New York Central in that search, and the stockyards company, and I believe it was generous—I mean I believe that they searched all through their files; and the final report to me was that they could not find this first agreement, and that is why it is not in the record.

Commr. MAHAFFIE. Is there presently an agreement with Swift & Company as to the use of that line?

Mr. RYNDER. Not a written contract.

Commr. ATTCHISON. Why don't you have one? Why didn't you have one executed some time ago? You have section 1 (9) of the act.

Mr. RYNDER. I don't think we need it.

Commr. MAHAFFIE. Sometimes there is one.

Commr. ATTCHISON. That relates to the matter of switches and the like.

Mr. RYNDER. But there has been, as I see it, an implied contract to perform the customary service there that has worked itself out over the years.

Mr. PIERCE. If I may continue, the record here shows no contract between Swift & Company and the New York Central Railroad.

Chmn. ALLDREDGE. Well, if you are rendering service there along that private track cannot we assume that a contract exists there, in writing or oral? It is implied; isn't it?

Mr. PIERCE. I think the burden would be, Mr. Commissioner, upon the complainant here to show that there was a condition of that kind existing and which entitled it to expect continued service.

Chmn. ALLDREDGE. If you are rendering service there isn't a contract necessarily implied?

Mr. PIERCE. Oh, there is an implied contract but the terms of that implied contract are not in this case and not before the Commission.

Commr. ATTCHISON. Well, the law supplies it; doesn't it?

Mr. PIERCE. Sir?

Commr. ATTCHISON. The law supplies it; doesn't it?

Mr. PIERCE. I doubt it here, Mr. Commissioner.

Commr. ATTCHISON. All right.

Mr. PIERCE. The thing that I would like to say here is that at all times the railroad company has been restricted in the use of this track 245 by this agreement with the stockyards company, which had this 30-day termination clause in it. The stockyards company owned the track; it was their property.

Commr. JOHNSON. May I ask this: Does that termination clause give them the right to terminate operation with respect to every kind of traffic?

Mr. PIERCE. It just says "terminate"; it is not any more explicit than that.

Commr. PORTER. But if you have legal obligations over there on the other part does the fact of your contract there excuse the New York Central in any way? Is not the burden on you to render that service over there that you are under a legal obligation to render?

Mr. PIERCE. Mr. Commissioner, there is no restriction of service or deliveries over the Swift & Company now except of livestock and that restriction was dictated by the stockyards company.

This thing is all covered in docket 28421, and we have to go outside the record here in order to cover it.

Now, the thing that brought this about was the letter
817 from the stockyards company which Mr. Heinemann read here, which notified the railroad companies—the stockyards company notified the railroad companies that "if you want to move traffic over this track you are going to have to pay the same per-head rate for moving livestock over there as you would have to pay to unload it at the unloading pens."

Swift & Company at that time were getting a volume of livestock directly to their plant through this track.

The record does show that the Swift & Company facilities for unloading livestock at their plant, while they had eight pens located over there inside the plant, only one car could be spotted at a time; the pens were some 300 feet away from the unloading track and they could only, as I say, spot one car at a time; and Swift & Company did not want to pay this charge for using this track and the railroad company did not want to pay the charge for using the track.

So, the railroad companies notified the packers, Swift & Company and the other users of the tracks back in there which had to be reached by this track No. 245, that if they wanted to use that track they would have to get permission from the stockyards company to do it because the track was owned by the stockyards company.

Commr. MILLER. I would like to know what the New York

Central is going to do if that contract is canceled and they cannot give their service to those industries.

818 Mr. PIERCE. I am not smart enough to answer that question, Mr. Commissioner.

Commr. MILLER. Well, it seems quite concrete to me, from outside the record.

Commr. PORTER. Well, if you have legal obligations over there it might even force you to condemnation proceedings so as to be able to render that service; might it not?

Mr. PIERCE. I am also not smart enough to answer that, Mr. Commissioner; that is hardly up in the present case.

Commr. PORTER. Yes.

Chmn. ALLDREDGE. It would seem that you have allowed an industrial development to take place, probably, over there, by leaning upon this uncertain provision about that 1,619 feet of track; isn't that right?

Mr. PIERCE. I think probably the whole thing came about because of the investment of the packers who wanted to arrange for traffic down in there for their own convenience. As I say, this record is not complete, as I see it, for a full consideration of the picture here; and if the Commission feels that all of those angles are important——

Chmn. ALLDREDGE. Well, they represent a condition that could grow and grow and grow and grow year after year.

Mr. PIERCE. It could grow; yes, sir.

Chmn. ALLDREDGE. It has grown since this case started; hasn't it?

819 Mr. PIERCE. I am not informed about that. There is no history in this case back of 1924 in the record.

Commr. SPLAWN. What does the record show, Mr. Pierce, as to the holding-out of the New York Central to the public as to this track?

Was it distinguished in any way or had it distinguished in any way between this and its main line? Has it been treated by the New York Central generally as a part of its own tracks and facilities?

Mr. PIERCE. It has not, Mr. Commissioner; it has been treated as a track and property owned by The Cleveland Union Stock Yards Company and there has been no direct control and management.

The New York Central Railroad Company simply had a permissive use to move cars over that track and they do today move cars over that track of other commodities than livestock.

Commr. PATTERSON. Is there a condition upon which you serve the other industries?

Mr. PIERCE. That is right; the same conditions as to all of the other industries as are applied to Swift & Company.

Chmn. ALLDREDGE. Do you suppose those other industries know that?

Mr. PIERCE. Well, I would think they do.

Commr. ATTCHISON. Have you got it in your tariff?

Mr. PIERCE. In the tariff?

820 Commr. ATTCHISON. Yes.

Mr. RYDER. No, sir.

Mr. PIERCE. I think the tariff is covered. I have not got them. They are probably, it seems to me, not of importance.

Commr. ATTCHISON. Well, it is of prime importance with respect to the question of holding out.

Mr. PIERCE. I think there is a notation in the tariff there which says it does not apply to livestock.

Commr. ATTCHISON. Well, formerly you had no such restriction or distinction, did you, in your tariff?

Mr. PIERCE. Well, now I would not be able to answer that, Mr. Commissioner.

Commr. SPLAWN. Is this contract one that you are required to report to the Commission and file with the Commission? The contract with the stockyards company for the use of this track.

Mr. PIERCE. I do not know whether that is required to be filed or not.

It simply said that the stockyards wanted to have the use made of the track and the railroad companies could maintain them if they wanted to have the use of them.

Of course, this whole thing around the stockyards—industry has grown up and all these relations between the railroads and the stockyards have been gone into in docket 28421.

Commr. ATTCHISON. The question would depend on
821 whether the Cleveland Union Stock Yards Company is a common carrier; wouldn't it?

Mr. PIERCE. I think it would; and they were held to be a common carrier during a part of this time.

Commr. ATTCHISON. Well, if they are a common carrier, by your provision here, a part of the time, the part when they are transporting livestock, then you have the obligation.

Mr. PIERCE. That, Mr. Commissioner, is something that has not been determined definitely, about the Cleveland Union Stock Yards Company being a common carrier; the whole thing has been sort of up in the air in connection with The Cleveland Union Stock Yards Company.

Commr. ATTCHISON. We held that they were not?

Mr. PIERCE. You held that they were while they were unloading livestock, while they were performing a transportation service, but not because of this track.

Commr. SPLAWN. That is what they said; is it not?

Mr. PIERCE. They held that the stockyards, since it did not any longer unload livestock, was not a common carrier, but that if it reverted to unloading livestock it would, for that reason, be reopened again in a specific case. I have gotten quite a ways off my argument here in answering these questions; may I take more time or not?

Chmn. ALLDREDGE. Well, go ahead.

Mr. PIERCE. All right. Thank you, sir.

822 There is no complaint, even though the railroads notified Swift & Company in 1938 that The Cleveland Union Stock Yards Company would not permit the use of the track any longer—the railroad companies notified them in 1938 but Swift & Company said nothing until 1941.

They wrote a letter in 1941, asking or demanding that that service, as Mr. Rynder says, be restored.

The railroad companies replied that that track belonged to The Cleveland Union Stock Yards Company and that it was like any other private sidetrack, so that if Swift & Company would obtain the necessary permission to use the stockyards tracks the railroad companies would resume the delivery of livestock. It only applied to livestock, and that was competitive business with the stockyards company's. Now those letters are in the files, exhibits 4 and 5.

I think rather than spend any more time on the contract provisions, although we think that is the most important thing in this picture, the restriction of this contract between The Cleveland Union Stock Yards Company and the railroad companies, which gave them only a 30-day terminating clause, they could not make any other use of it except as it was limited by that contract.

Chmn. ALLDREDGE. Well, from my point of view, you certainly ought to have put these other industries located farther out on notice when you entered into that sidetrack arrangement

823 with them of what flimsy grounds their service would depend upon.

Mr. PIERCE. Well, Mr. Commissioner, if I may go out of the record I would say that there would be a number of those documents or items that might be proper in this case but the burden is upon the complainant here to show that there was any dedication here to public use of this property.

Chmn. ALLDREDGE. Well, I do not know about that. He has a right to expect service on a private siding that connects with your line to get into his plant.

Commr. JOHNSON. There is no question, is there, but what that part that goes up towards the right side on the map is dedicated

to public use and is railroad property of the New York Central?

Mr. PIERCE. That is the track that serves the former haybarn of the stockyards.

Commr. JOHNSON. It is owned by the New York Central; isn't it?

Mr. PIERCE. That is New York Central track. Then there is another track in here, off 245, which is used also; that is the stockyards'.

Commr. JOHNSON. I am talking about the New York Central. This section is called the New York Central tracks and is dedicated to public use, as I understand it.

Mr. PIERCE. That would be a conclusion. I believe that it connects with the New York Central but as to whether or not
824 it is dedicated to public use, it seems to me, when you get into the realm of public-use dedication there is some question about it.

Commr. JOHNSON. Well, then, it is subject to the act.

Mr. PIERCE. I do not feel smart enough to answer that properly, Mr. Commissioner.

Commr. MAHAFFIE. Is that switch in the ownership of the stockyards or the New York Central?

Mr. PIERCE. I believe it is—I think the New York Central owns this track so that they can get back here; I think they probably do, Mr. Commissioner, although practically all of that track has been taken up and has been removed; there is no longer any way or any use for that track over there. Now I would like to say this:

We feel that the proposed report indicates that the contentions of the parties received the careful consideration of the examiner.

The examiner gave full credit to the fact that the ownership of the 1,619 feet of track 245 was the controlling feature in this case and that the stockyards company continually owned said track and yet so owns said track.

The examiner correctly applied appropriate principles to the facts developed in the record, and it is our opinion, of course, that the proposed report as written should be sustained by the Commission.

825 The right to the use of the stockyards company's portion of track No. 245 has always been a limited right by reason of the presence of the 30-day termination clause in the contract and further by the amendment to the contract governing the movement of livestock over the said sidetrack.

The record shows that the New York Central Railroad has delivered shipments alike to all industries, including complainant and competing packing companies which are served by the use of

track No. 245, to the extent that the stockyards company has permitted the use of such track.

There is no discrimination here, as the carriers see it, between Swift & Company and these three industries over here. They have their own private sidetracks which connect directly with the New York Central, leading out from its main line. There certainly can be no——

Chmn. ALLDREDGE. Well, Swift & Company, as I understand, has a private siding into its plant, connecting with the New York Central Railroad Company's tracks.

Mr. PIERCE. Not a complete connection; it does not connect with the main track; it connects with two intervening tracks. There are four sections here.

Chmn. ALLDREDGE. What difference does it make to the shipper or receiver whether he connects to a main track or some substantial track?

Commr. JOHNSON. As I understand it, you have not been
826 forbidden to transport—Under the contract you cannot transport livestock over track 245 but it is just simply a question of how much you are going to pay if you do it.

Mr. PIERCE. It was a question, Mr. Commissioner, of saying to these people that were served by this track that we would do such things as the stockyards company permitted us to do over that track.

Commr. JOHNSON. They will permit you to do it, provided that you pay them for it the normal tariff rate.

Mr. PIERCE. If the railroad would pay $10 a deck in some cases instead of $1.25, which the Commission has found is reasonable for the service—If it would pay that per-head, which amounts to eight times the reasonable charge for unloading at the stockyards, it would probably be true.

Chmn. ALLDREDGE. Under your theory should not this contract that Swift & Company has, whether it is in writing or implied, concerning the private sidetrack serving this plant, have been made directly with the stockyards as the owner of that track instead of with the New York Central Railroad? Under your theory?

Mr. PIERCE. Swift & Company should procure the use of that track for servicing this plant.

May I say this: There is nothing obligatory in the act, so far as I know, that the railroad company has to go off its own property and acquire property of someone else in order to
827 connect with private sidetracks.

Commr. JOHNSON. But you are doing it all the time, and this connection is not, as I understand, with the property of somebody else but is with the property of the New York Central.

Mr. PIERCE. Subject to such rights as the New York Central acquires under this agreement with the stockyards company.

Commr. JOHNSON. Its agreement is that it can use it provided it pays for it, according to Mr. Heinemann.

Mr. PIERCE. I don't think Mr. Heinemann's letter is in evidence. It may be.

Mr. HEINEMANN. It is.

Mr. PIERCE. What exhibit is it, Mr. Heinemann?

Mr. HEINEMANN. It is in evidence.

Mr. PIERCE. If it is I stand corrected. We feel that the principle controlling this current situation was decided by the Commission in 68 I. C. C. 261, Certain-Teed Products Company v. C., R. I. & P. Railroad Company, et al.

In that case the Commission said: "There is no duty on the part of a common carrier subject to the act to provide tracks off its lands to effect connection with an industry. If an industry desires connection with a trunk line the duty devolves upon it to make arrangements for the procuring of a spur. Paragraph 9 of section 1 makes it the duty of a common carrier under
828 stated circumstances to construct, maintain, and operate, upon reasonable terms, switch connections with private sidetracks which may be constructed to connect with its rails by shippers tendering interstate commerce but this duty does not arise until the shipper has provided the sidetrack."

Commr. MILLER. Well, do these industries on your railroad meet that condition?

Mr. PIERCE. Outside of the record, I think they do; yes, sir.

Commr. MILLER. They do.

Mr. PIERCE. That is not in this record.

Commr. MILLER. I think we are making a record here, apparently.

Mr. PIERCE. Well, if we were going to make it over again I think we would include, perhaps, other matters.

Chmn. ALLDREDGE. That situation is rather precarious under those conditions; is it not?

Mr. PIERCE. The switching rights over that line?

Chmn. ALLDREDGE. All those industries on that branch of your line.

Mr. PIERCE. They know that this track belongs to the stockyards.

Commr. JOHNSON. Suppose the stockyards gave you another 30 days' notice and said you could not use the track at all, what would those industries do?

829 Mr. PIERCE. I suppose they would be down here before the Commission for an order compelling the stockyards to supply the track down there.

Commr. AITCHISON. They have no relations, under the law, with the stockyards, unless the carrier is subject to the act.

Commr. JOHNSON. Well, the New York Central; they do not connect with the stockyards.

Mr. PIERCE. Well, it is not a complete connection, Mr. Commissioner; it is incomplete.

Commr. JOHNSON. It is, so far as they are concerned.

Mr. PIERCE. Sir?

Commr. JOHNSON. It is, so far as they are concerned; they don't know what is done.

Mr. PIERCE. Yes; but on this line here—This is the missing link of a complete connection between the New York Central and Swift & Company.

Commr. JOHNSON. It is a link that may be somewhat missing.

Mr. PIERCE. Well, it is missing right now for livestock.

Commr. JOHNSON. Missing for livestock under certain conditions.

Mr. PIERCE. And that is because it is restricted by The Cleveland Union Stock Yards Company provision.

Chmn. ALLDREDGE. Well, now, the stockyards company may make the same sort of restriction on the transportation of coal if it wants to?

830 Mr. PIERCE. They could; yes, sir. And, as Mr. Heinemann stated to the Commission here, it is not their desire to do that; they simply want to control this livestock and bring it through the stockyards upon the yardage charges. There is your real picture, if I do have to come out and say it.

Chmn. ALLDREDGE. You have got to render service to these other industries down there on whatever condition the stockyards wants to enforce; is that right?

Mr. PIERCE. We built that because they own the track and reserved their utilization or restriction by direct management of the track.

Chmn. ALLDREDGE. And, knowing all that, the New York Central built on through that other part of the line.

Mr. PIERCE. With the knowledge of the users of the track there; yes, sir.

Commr. AITCHISON. How could they have knowledge of what your contract with The Cleveland Union Stock Yards Company provided, when we can't even agree on what it is right here?

Mr. PIERCE. Well, they had knowledge, I would say, Mr. Commissioner, that there was a permissive, a restricted, limited use of that track. Yes; that is that one limit at that time, if I might take a chance on saying that that is a limitation.

Commr. AITCHISON. A good chance for a guess.

Mr. PIERCE. Now another thing: We feel that the Commission in a very early case, in a decision written by Chairman
831 Cooley, enunciated the principle of law involved in this controversy, in 2 I. C. C., 771, and in that case the Commission said:

"1. In the absence of statutory provision the rights of a railroad company under a lawful agreement for the specified use of the tracks of another railroad company are measured in respect to the tracks used by the terms of the contract and the provisions of the act to regulate commerce apply to the situation created by the contract and add no authority for a different use of the tracks.

"2. The duty of a railroad company operating its own road or a road that it controls to serve the local stations on its line does not apply to a company that has only a running privilege for through trains to reach points on its own line over a part of the road of another company which it does not control. In such a case the company is not required to disregard the provisions of its agreement and does not violate the provisions of the act to regulate commerce by not receiving and discharging traffic on the tracks of the proprietary company, the sufficiency of the local service rendered by the latter not being questioned."

The arrangement with the stockyards company ought to be in the same category here.

Chmn. ALLDREDGE. Do you think so?

Mr. PIERCE. Personally, it is my opinion, it could.

832 Commr. JOHNSON. Well, have you ever made a contract with the owner of this 245 that you would not transport livestock over that?

Mr. PIERCE. We have been subject, Mr. Commissioner, to their control by this 30-day terminating clause. They came in and said, in 1934, "We are going to terminate this contract; we are going to cancel it." That was in 1934.

Well, they had conferences and it was agreed that it would not be canceled; but The Cleveland Union Stock Yards Company wanted to amend it and that amendment was that they could haul anything over that track except livestock—"We want the livestock to come through our stockyards."

Commr. JOHNSON. That you could haul at a price.

Mr. PIERCE. We could haul at a price; yes, sir.

Commr. JOHNSON. Well, then you have never made a contract with them that you would not haul livestock over 245.

Mr. PIERCE. Well, they have told us that we could not haul livestock.

Commr. JOHNSON. Except at a price, you say.

Mr. PIERCE. Yes, sir.

Commr. JOHNSON. Well, at a price. But you can haul livestock over the track and you have no contract to the contrary outstanding.

Mr. PIERCE. There is no contract to the contrary outstanding.

833 — In the Alford case, if I may come back to it just a moment, the Commission said there:

"The law deals with the actual situation and does not create a different one. Its provisions apply to powers that exist and regulate their exercise. The Union Pacific Company operates its own road. The respondent has only a running privilege over a portion of it, to reach points on its own line by a shorter route, operating its own trains, but the tracks, stations, switches, train dispatchers, and line employees remain in charge of the Union Pacific Company, which company also makes the rules and regulations for the operation of the road. The respondent has no control over the road or its instrumentalities. It has no contract right to use the stations of the Union Pacific Company or its facilities for business on its route, except switches, water tanks, and telegraph lines. It receives and discharges passengers and freight on its own tracks and at its own stations both at Kansas City and Topeka. Its rights, therefore, are not the general rights of a common carrier upon its own road but are limited and qualified by the agreement."

Chmn. ALLDREDGE. Well, now, carrying the analogy a little further, suppose in the case the railroad operated under the trackage rights and had gone ahead and made a sidetrack contract with some industry to serve it without putting those restrictions in.

834 Now what do you think would be its obligations if the owner of that sidetrack demanded service?

Mr. PIERCE. Might I ask a question? That is assuming that they were not put on notice that there was a restricted use of the track?

Chmn. ALLDREDGE. That is right.

Mr. PIERCE. Then I would say that the railroad company was undertaking something that it would probably be compelled to continue.

I say "probably."

Chmn. ALLDREDGE. But you have not told us why Swift & Company and these other industries on that detached branch, after having been put on notice that their sidetrack contracts are tied up with this contract you have with The Cleveland Union Stock Yards Company——

Mr. PIERCE. We haven't told you that; it isn't in the record nor is there anything else in the record to show that we established a service that was to be continued with Swift & Company.

It was always a restricted service and there is no showing in this record that there is anything other than a restricted service here.

Mr. RYNDER. Oh, I beg pardon.

Mr. PIERCE. Now the other situation, if I may take just a moment:

835 Swift & Company billed shipments of livestock for delivery at the unloading chutes of the stockyards as well as for delivery to its private sidetrack during the time that the New York Central Railroad had the permission of the stockyards company to use track No. 245 in order to make deliveries of livestock to Swift & Company's plant.

Chmn. ALLDREDGE. So far as I am concerned, I do not see what difference that makes.

Mr. PIERCE. Well, except that when they did have the use of the track for livestock they did not use it 100 percent; they still had the service over the stockyards if they chose.

Chmn. ALLDREDGE. The stockyards is there for whatever use they want to make of it.

Commr. JOHNSON. Do I understand you to say that the record discloses that Swift & Company and other industries were on notice that they were connected up with your main line or with your main siding by a terminable contract?

Mr. PIERCE. I do not believe that the record shows, Mr. Commissioner, that the other industries were.

Commr. JOHNSON. I thought you said a minute ago that the other industries were.

Mr. PIERCE. I say that the record does show that Swift & Company have had no assurance that they could have continuous service over this track. I think the record is silent on that phase of it.

836 If I am wrong I would be glad to be corrected on it.

All of the cases cited by Swift & Company in their brief and on argument are clearly distinguishable from the situation here.

In those cases where there may be some similarity of conditions the tracks were owned by the railroad company and they had full management and control of the tracks; it was not where there was an intervening party like The Cleveland Union Stock Yards Company in any of the cases cited.

Mr. RYNDER. There is a case to the contrary. That is such a misstatement!

Mr. PIERCE. In the Morgan Run Company case, the Burt heirs

conveyed a 33-foot strip of land to the Morgan Run Coal & Mining Company, grantee, to construct, maintain, and operate a railroad or tracks, sidetracks, switches, and so forth, on the premises, and secured to the grantors, their heirs, and so forth, the same and equal opportunity and facilities for receiving and shipping freight of all kinds as are received by other persons, and would have permitted the grantors to have built a railroad or switch from the premises so conveyed to premises owned by grantors.

That was the situation in the Morgan Run Coal Company case.

In Union Lime Company v. Chicago & North Western, that was a condemnation and eminent-domain proceeding to
837 obtain land to extend a private track.

The Wisconsin statutes were involved in the building of a spur three miles long. The Wisconsin railroad commission directed the railway company to extend the spur as the use of the spur track, when built, would be a public one.

The Supreme Court said, "While common carriers may not be compelled to make unreasonable outlays it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities under reasonable conditions."

A special Wisconsin statute controlled in that case.

Now on the question of dedication—And I wish that I had more time to discuss this subject—we believe that the burden of proof here that there has been a dedication is upon the complainant.

Commr. JOHNSON. I do not see how dedication gets in here as an issue, myself, but others may. But how do you think that it gets into the case?

Mr. PIERCE. Only to answer the arguments of the complainant; that is the only reason. I do not see how it gets in here.

Commr. AITCHISON. You are using it and used it in railroad service until this 30-day option was exercised and you were ousted.

Aren't you estopped to claim anything with respect to its
838 not having been put into public service?

Mr. PIERCE. It is our claim, Mr. Commissioner, that there was no dedication because the owner at all times maintained its absolute control, when there could be no dedication of the property.

I think the real dedication of property turns upon whether the owner retains control; if he retains control of it there is not open adverse user.

Commr. AITCHISON. It makes no difference in the least that there is a defeasance clause.

Mr. PIERCE. I would like to correct Mr. Rynder on the fact that there is a lease. This is not a lease as a lease is ordinarily

understood; it is simply a permissive contract to use that track in such way as The Cleveland Union Stock Yards Company would permit it to be used.

Commr. AITCHISON. Well, your tenancy by sufferance, then.

Mr. PIERCE. I would say that that is so, except that "by sufferance" is not intended to cover all the burdens of the use of the track.

Commr. AITCHISON. But you do compensate him in the way of maintenance of the track.

Mr. PIERCE. For this 1,619 feet; that is correct; yes, sir.

Commr. AITCHISON. Is there any other consideration that you make to The Cleveland Union Stock Yards Company?

839 Mr. PIERCE. No, sir. In connection with other tracks not involved here we also agreed to maintain those tracks if they could be used.

Commr. AITCHISON. That is, you maintain not only track 245 but you maintain also other tracks.

Mr. PIERCE. Tracks of the stockyards company used and placed on their property; the railroad maintains them and the railroad company can make such use of the tracks as The Cleveland Union Stock Yards Company permitted.

Commr. SPLAWN. As I understand, they recently exercised their option on either this 1,619 feet, and unloaded at their private pens, or at the stockyards; is that correct?

Mr. PIERCE. Up until 1938.

Commr. SPLAWN. 1938. And did you file a tariff in which it was stated that there would be no delivery to Swift & Company?

Mr. PIERCE. Yes, sir; the tariff says—I think it is 8785—the tariff says it does not apply to livestock. And that is an exhibit in this case; I believe it is exhibit 2.

Commr. SPLAWN. That is for deliveries on that 1,619 feet.

Mr. PIERCE. Yes, sir; which is delivered by us on that 1,619 feet.

Commr. SPLAWN. I see.

Chmn. ALLDREDGE. Your time is up, Mr. Pierce.

Mr. PIERCE. Well, thank you very much.

840 Chmn. ALLDREDGE. Mr. Rynder.

Reply Argument of Mr. R. D. Rynder on behalf of Complainant

Mr. RYNDER. I will use just a few minutes. There have been some questions from the bench as to whether there was a contract there and whether there was any public holding-out by the New York Central in connection with this service.

In a great many of these transportation questions private

parties do a couple of little things and the law makes the rest of the contract, and I think that such a contract was made here. The New York Central tariff, described in their opening brief at page 8—And I believe it is copied in the record—for many, many years provided—I think in most of them and I think in most of your rules—the specific industrial deliveries which would be made.

I am not attempting to quote the words of the tariff but it did in specific words say that the line-haul rate would include the delivery to the company along this portion of the Swift & Company tracks of livestock and all other commodities.

We say that that was a holding-out and we were entitled and we therefore became a party to a contract held out by the carrier under which we have a right to have that delivery at our plant just as a contract with the railroad entitles us to have a car of salt or coal delivered at our plant.

841 Now there is nothing in that tariff—And I defy the ingenuity of counsel to find it—which places any limitation or even mentions that any part of the track used in making the delivery was owned by a party other than the New York Central.

I submit most emphatically that counsel cannot find a word to that effect; and the only place that it had the right to do that, even—And if counsel can find that within six months from now I will agree that he may put it in the record.

Commr. ATCHISON. Don't you want us to decide this case before then?

Mr. RYNDER. If he can find that I will be glad to ask to have it reopened on that ground, because it is not there. And both counsel, who are my very good friends, know very well that no such language is in the tariff.

Now as to the question of compensation for that track I do not think that concerns Swift & Company at this stage of the proceeding. The railroad simply changed its industrial terminal operations and eliminated the delivery of livestock to Swift & Company and we have asked to have it restored.

Now, if that involves some settlement for the use of that track between the parties, we think that that is a supplemental chapter of the story which should come here upon a proper statement of the facts when the time arises.

Commr. SPLAWN. If the Cleveland Stock Yards—Mr. Rynder, I don't know where you are the one to answer; you may

842 answer if you want to——

Mr. RYNDER. Sir?

Commr. SPLAWN. If The Cleveland Stock Yards insists on this modification of their contract with the New York Central then

we will, in order to straighten that out, have to reopen the stockyards—common carrier case and determine whether or not under that state of the facts as to the use of the track they are common carriers.

Mr. RYNDER. That is pretty difficult for me to answer and I would like to say that part of the difficulty of that answer is going outside of this record.

What I mean is that the Livestock Terminal Service Company—I think you are all acquainted with that company—has on file here an application to abandon its service and that has been heard by the examiner.

Now, if your determination would be that the service would now be performed by the stockyards company, probably then its status would revert to what it was formerly, but that depends upon your decision in the abandonment case and whether that work goes back to and is performed by the stockyards company; and I cannot answer that question at this time. I thank the Commission.

Chmn. ALLDREDGE. The case stands submitted and will be taken under advisement, and the Commission adjourns.

(At 11:45 a. m. the hearing herein was concluded.)

845 Before the Interstate Commerce Commission

Docket No. 28714

SWIFT AND COMPANY

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

Reporter's transcript of oral argument

HEARING ROOM "A",
INTERSTATE COMMERCE COMMISSION BUILDING,
Washington, D. C., Wednesday, October 3, 1945.

The above-entitled matter came on for oral argument before the Commission at 10:00 o'clock a. m.

Present: Commissioners Rogers (Chairman), Porter, Lee, Mahaffie, Miller, Splawn, Alldredge, Patterson, and Barnard.

Appearances: R. D. Rynder, 4115 Packers Ave., Chicago, Ill., appearing for complainant. Matthew S. Farmer, 802 Engineers Bldg., Cleveland 14, Ohio, appearing for The Cleveland Union Stock Yards Co. Robert R. Pierce, 1324 West 3rd St., Cleveland, Ohio, appearing for New York Central Railroad and other Cleveland carriers.

847 PROCEEDINGS

Chairman ROGERS. The Commission will hear argument in Docket 28714, Swift and Company against The Baltimore and Ohio Railroad, et al. Mr. Rynder.

Argument of R. D. Rynder

Mr. RYNDER. If the Commission please: This case involves the switching of livestock to the plant of Swift and Company, Cleveland, Ohio. I will come to the facts in that connection in just a moment.

I would at first, however, like to disclaim one compliment or epithet, as you call it, that appears in the defendants' exceptions, and that is the reference to the complainant several times as appearing here as an innocent shipper. The complainant and myself are not innocent in any sense. I think we all know the facts in this case from the time they got it started. But there were certain facts which perhaps need a bit of explanation.

The plant of complainant is opposite the stockyards, and I will describe it more particularly in a moment.

For a number of years the stockyards had provided in its tariff that the charge made by it in connection with the unloading, and so forth, of livestock included delivery. When the alter ego of the stockyards, the Livestock Terminal Company, took over
848 the unloading, it also provided that its charges include delivery of livestock. As long as that was so, the livestock arrived at complainant's plant at the flat Cleveland rate whether it was unloaded in the stockyards or whether it was switched to our plant.

It was not until the decision of the Commission in Baltimore and Ohio vs. Cleveland Union Stock Yards Company, 255 I. C. C. 579, which was in May 1943, that it was decided as to Cleveland that the shipper was not entitled to egress for its livestock from the stockyards except upon payment of the yardage charges. So that it was only at that time that the refusal of the New York Central to deliver livestock on complainant's plant siding could result in extra charges to the complainant.

I might say that in this case, which originated in 1940, we were in there with one of the consolidated complaints, urging that we had a right to delivery of livestock or egress without extra charge. The report of the Examiner sustained that contention. The Commission decided otherwise.

Chairman ROGERS. Just one moment, if you please. Division 2 has a case for argument following this, but we have two and a half

hours in the first case, so the parties in the Division 2 case may be excused until 2:00 o'clock.

Mr. RYNDER. I have placed before you a sketch which appears in the appendix to my exceptions. It was largely
849 taken from the map which is Exhibit 12 that Mr. Pierce has had attached to the board here.

By reference either to that sketch or the map you will note that the main line of the New York Central Railroad runs along the northern edge of the Cleveland Stock Yards.

Commr. LEE. Is that the red line on the wall map?

Mr. RYNDER. That is it [indicating]. Then, coming off from the line of the New York Central there is 132 feet of track which belongs to the New York Central. Following down the yellow line, which is black on my sketch, there are 1,619 feet of track of which the Stock Yards is the owner. Then, coming again to the red line, that is track of the New York Central which connects with and serves seven industries in the stockyards neighborhood.

Commr. MILLER. Mr. Rynder, do you have to go over that stockyards track to get to the New York Central track on the south?

Mr. RYNDER. Yes, sir; there is no other way of doing it. Because it will be an important part of my argument, I would like to emphasize at this time that our plant, as well as the other plants in this district, are connected not with the stockyards track but with the tracks of the New York Central used in its general terminal service. Those other industries are Earl C. Gibbs, Inc., Kreinberg and Krasny, Standard Beef Company, Hughes Provision Company, Koblenzer Brothers, Theurer-Norton Pro-
850 vision Company, and Swift and Company.

At this point I would like to say, in the short time I have had I have, of course, read the defendants' reply to exceptions, and a great many cases are cited there and I think you will find that not one of them involves this situation of the track of private ownership being in effect or connecting up two parts of a line-haul railroad. I think that is very important in this case. I think that all the cases cited involve the use of private sidetracking going to an industry or industries beyond it. Swift and Company is not using the stockyards track, and we are served by a New York Central track.

Now, the fact is that from 1910 until November 12, 1938, the carriers at Cleveland, defendants in this case, provided reciprocal switching charges in connection with the delivery of livestock and all other traffic, under which it was delivered to these industries at the flat Cleveland rate.

On November 12, 1938, that reciprocal switching charge was canceled, so no tariff means existed of moving a carload of livestock arriving via the Pennsylvania, let us say, but the New York

Central did not cancel its own tariff which provides for the delivery of livestock and all other commodities, that is, to all industries upon its line. That remains unchanged, as the Examiner finds. So far as the tariff goes, we would still be entitled
851 to the delivery of that livestock. However, the New York Central has refused to deliver livestock since the date of that change in its reciprocal switching tariff.

Commr. BARNARD. Why has it refused? Has it refused because the Stock Yards Company would not permit it to?

Mr. RYNDER. Yes, sir.

Commr. BARNARD. That is, they have a lease arrangement?

Mr. RYNDER. Yes.

Commr. BARNARD. Do you think you could control that private track of that Stock Yards Company under that lease arrangement?

Mr. RYNDER. I am hoping to come to that.

What I have been trying to get before you at the moment is simply the basic facts.

The New York Central also receives and delivers all other classes of freight over the same tracks and uses them for general railroad purposes.

Aside from our assertion that the New York Central is failing to perform its statutory duty in the delivery of freight, and in accordance with its tariffs, we have here a case of discrimination.

On this small sketch I have handed to you, you will note that the Ohio Provision Company, the Long Dressed Beef Company, and the Lake Erie Provision Company are located adjacent to the New York Central main line. That would be right up here [indicating], and the New York Central delivers
852 livestock to those companies while refusing to deliver them to the plant of the complainant. We believe the violations of law established are these: Failure to make delivery in accordance with statutory duty and tariffs.

Discrimination between complainant and three competitors and a discrimination between commodities.

The question involved is whether the New York Central may refuse delivery of livestock and for that matter all other freight because the 1,619 feet of track connecting two of its own tracks is owned by the Stock Yards, although used for general railroad purposes for the last 35 years.

The Examiner proposes to dismiss the complaints on numerous grounds, which may be summarized generally, as follows: that the Commission is without power to grant relief, even though it thought there were a violation of the Act, and without power to enter an order under section 14—and I suppose also under section 16, although they do not state so.

Secondly, that the 1,619 feet is a private track over which the

Stock Yards may exercise complete domination, even though used in common-carrier service, connecting two New York Central tracks for 35 years, and at present used to serve seven industries; that the refusal of the New York Central to conform to its tariff is merely a technical matter and not a material fact, and that
853 it is not the duty of the Commission to decide whether a refusal of the Stock Yards Company to permit the use of its track for the movement of livestock is legal, although that company is a defendant in this case.

We have taken 14 exceptions to the Examiner's report. I will hurriedly pass over several of them because I do not think they would in any way affect or change your decision.

The Examiner at one point states that four industries are served over this track. I believe the number should be seven.

We believe the Examiner's report is inaccurate as to the extent of the unloading facilities at the Swift plant, but I do not think the decision can turn on that point.

He mentions also that the jurisdiction of the Secretary of Agriculture as to charges on direct shipments for services beyond the unloading pens is under the Packers and Stockyards Act. That is true, of course, but only applies to service rendered and not as to car loading on industry tracks.

He refers to the nonpayment of yardage charges over a certain period. I think I have already explained that, and the final decision of this Commission in 255 I. C. C. 579.

Now, the Examiner says that one justification for the refusal of the New York Central to make delivery of livestock is that in the lease between the New York Central and the Stock Yards Company, there is a clause providing that the railroads shall have the free and uninterrupted use except for competitive traffic.
854 We have contended in our exceptions there is and can be nothing competitive here.

Commr. BARNARD. As I understand this case, back in the old days you were worth something to this Stock Yards Company because you used the pens and paid them rent, and then they sold you feed. Then you changed your way of getting your stock and brought it in by carload. Isn't that competitive with the stockyards?

Mr. RYNDER. No, sir. A stockyards company by Federal statute can be engaged only in the occupation of providing a depot or something for the sale of livestock. We are, I should say, the largest buyer of livestock of the Cleveland Union Livestock Yards.

I have taken as an illustration a shipment, of which the bill of lading was put in, together with several others. It started at Indianapolis. We were certainly not competitive with the Stock Yards Company in the purchase of that livestock in Indianapolis.

It cannot, as a matter of law, engage in the purchase and sale of livestock.

It was our property in Indianapolis. We shipped it over the New York Central to Cleveland. Certainly it was not competitive in that sense.

If our direction had been carried out it would have been switched to our plant, and certainly we are not competitive
855 in that sense, as the Stock Yards Company performs no switching service. The only thing that could be competitive with the Stock Yards Company, as I see it, is another stockyards company.

If that is not sufficiently plain, let me suggest that practically all of our livestock during this period—and we expect a greater amount if this condition continues—will come by truck, and I would like to know what will be competitive about that or how the Stock Yards Company can prevent that reaching our unloading pens, just as it has not been able to for some years back.

Commr. BARNARD. Of course, it could not control the operation of trucks, but certainly it can control that track that is not a railroad in the meaning of the statute.

Mr. RYNDER. Yes; but it is in our power to control the situation and not suffer.

Commr. BARNARD. The New York Central cannot do anything about it if they cannot make an arrangement with the Stock Yards Company and if they have a lease arrangement whereby they can refuse if they want to.

Mr. RYNDER. If you are correct about that, I am at the end of my argument right now.

Next, the Examiner says that the 1,619 feet of track could be abandoned without approval of this Commission. That
856 may be true, but we have not that question at this time. The track has not been abandoned, and so long as it remains in place it is our contention that it may be regulated by this Federal Commission.

This point was very definitely settled in Southern Railway Company vs. Sheahy, 18 Fed. (2d) 784. I have quoted fully from it at page 24 of my exceptions, and I will not take your time now. But I do ask attention to that case which passes specifically upon this point, that although a local track may be abandoned without the authority of this Commission, so long as it is in place it is subject to regulation by this Commission.

We also except to the finding of the Examiner that the failure of the New York Central to comply with its tariff which is still in effect is merely technical. That tariff still provides for delivery of shipments arriving via New York Central and also from connecting lines and from stockyards.

Directly contrary to such a holding as to the mere technical end of the tariff is your decision in Guyton and Harrington Mule Company against L. & N. R. R. Co., 50 I. C. C. 546, which we quote in our exceptions as Case 29.

The Examiner also holds that the Commission is without power to afford relief by an order under section 1, paragraph (4), and I think it would follow under section 1, paragraph (6), that
857 it may not order a carrier to furnish transportation service required by statute and by its published tariff. The authority for this is the decision of the Supreme Court in 1916 in United States against the Pennsylvania Railroad Company, 242 U. S. 208, 61 L. ed. 251.

That case involved an order of this Commission requiring in effect that carriers build or otherwise provide tank cars which they did not possess. The Court repeatedly points out that it is dealing only with that phase of the subject, the power of the Commission to order the carrier to build a facility which it does not possess, to wit, tank cars.

Now, it is one thing to say to the Commission it may not order carriers to build tank cars or a facility which they do not possess, and quite another thing to say that the Commission may not require carriers to use without discrimination tank cars or refrigerator cars or any other facility that is in their possession and in their use. I have discussed the cases following that quite fully at pages 32 and 43 of our exceptions, and ask your attention to them.

The most complete discussion of that case that I have been able to find in the decisions of this Commission is York Manufacturers vs. Pennsylvania Railroad, 107 I. C. C. 219, pages 38 and 39 of our exceptions.

The Commission there held that the Pennsylvania tank car decision did not prevent it from requiring the extension of reciprocal switching arrangements in York, Pennsylvania.

858 I think, too, that the decision of the Supreme Court in these recent terminal cases makes it quite clear that the Commission has power to enter appropriate orders under section 41. The Supreme Court there said that the Commission has power to determine and order what practice is or will be just and fair and reasonable to be thereafter followed, and to make an order that the carrier cease and desist from violation to the extent the Commission finds a violation does or will exist.

If you have the power to tell a carrier where it may not put a car in connection with delivery to certain industries, it seems to me it almost follows as a matter of course you have the equivalent power to tell him where he must put the car in order to perform a delivery under the law and under his tariffs.

An order exactly similar to that which we are seeking here was

made by the Commission in a very early case, Baltimore Butchers Livestock Company against P. B. & W. R. R. Company, 20 I .C. C. 124. I have that in my exceptions. That order was never contested and was obeyed.

The Examiner also holds that it is unnecessary to determine whether a refusal of the Stock Yards to permit use of the track is illegal. I think perhaps a better way to state it is whether the New York Central may refuse to deliver livestock trans-
859 ported by it to Cleveland, upon side tracks connected with its own lines.

Swift and Company does not desire to use any part of the 1,619 feet. It operates no engines or anything else of a common-carrier nature, any more than it does when the 1,619 feet is used for the delivery of a carload of coal or the movement out-bound of a carload of packinghouse products. However, we did make the Stock Yards a defendant in this case. We did that under Volume 49, U. S. C. A. 42, that is the appropriate section of the Elkins Act.

Commr. BARNARD. Mr. Rynder, do you agree that the lease between the New York Central and the Stock Yards Company is a valid lease?

Mr. RYNDER. I was hoping to get rid of some of this ground work and I hoped to discuss fully the point then that is in your mind.

If I may interject, however, a comment and answer at this point, I would say this:

I think a man cannot lease a piece of property to a railroad, whether it be a sidetrack, a refrigerator car, or a tank car, or anything else you please, upon the condition that the carrier shall use that so as to produce a discrimination under the Act or otherwise to violate the Act. I think to that extent I might state that the lease, if that is a proper interpretation of it, is invalid.

Now, I stated we made the Stock Yards a defendant under
860 the appropriate clause of the Elkins Act, which says that

"It shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

Now, there have not been too many cases under that section of the Elkins Act, but I think that all of them sustain my contention. I have cited them in my brief. I hope here to mention, I think, only two.

In the Spencer-Kellogg case, which arose at Buffalo, the ele-

vators owned by Spencer-Kellogg were receiving an allowance for elevation from the railroads, I believe, at 1 cent a bushel. To attract business they advertised to their customers that if they sent the traffic through the Kellogg elevators they would refund one-half of the 1 cent. Spencer-Kellogg was not in any sense a common carrier but they were enjoined from carrying out those contracts. I beg your pardon, it was a criminal prosecution, and they were found guilty of giving a rebate.

Another case that is quite recent and doubtless in your mind is the General American Tank Car Corporation vs.
861 El Dorado Terminal Company, 308 U. S. 422. There the tank car company was leasing tank cars to the El Dorado Company, a shipper. After certain decisions of this Commission affecting the mileage allowance on refrigerator cars, the tank car company refused to pay to the El Dorado Company—I should go back and say the original contract provided that the El Dorado Company should pay the tank car company, I believe, $35 a month. The tank car company would pay to the El Dorado Company the mileage received from the railroads. The mileage amounted to more than $35 a month. The tank car company refused to pay out of the mileage more than $35 a month, and suit was brought by the El Dorado Company to recover under the contract. The case, as you know, reached the Supreme Court which said that it should have been stopped until they had applied for an administrative ruling from this Commission. That administrative ruling was given.

Now, the General American Tank Car Corporation was not and is not a common carrier for hire. It only furnishes tank cars upon lease to railroads or to individual shippers. Yet, your holding is that the tank car company may not take that mileage and give to the shipper more than the rental paid by the shipper to the tank car company. Clearly that order was made under the authority of this section of the Elkins Act or else you would not have any authority to make it.

The Examiner also says that the conclusion is justified
862 by your decision in Limits Industrial Building Corporation, 258 I. C. C. 438. There is quoted a paragraph from that decision. And I now quote:

"Common carrier services over private tracks cannot be expected, and certainly cannot be compelled by us, where obstructions against the use thereof, not caused by a carrier, prevent it from furnishing the desired transportation upon those tracks. Nor is it within our jurisdiction to order a carrier, or any other party, to take steps to remove such obstructions.

"In that proceeding intervener, Taylor Forge and Pipe Works, fenced off a section of the spur track on their property, previously

in operation, thus preventing defendant therein, although willing to do so, from continuing freight service over that spur to and from the plant of the complainant therein. A judicial decree therein, not against the defendant, but against the predecessor of the complainant, also prevented the desired switching service. It is not within our jurisdiction to order a carrier, or any other party, to take steps to remove obstructions, not caused by a carrier, which prevent the carrier from performing common-carrier services over private sidings and private industrial tracks."

To understand that case completely you ought to read the decision of the United States Supreme Court in the Greenlee Foundry Company vs. Borin Art Product Company, 379 Illinois 494.

863 There was involved a street in Chicago and along it had been built a little stretch of private sidetrack. There was an injunction by the court restraining the builder from building the track, as it was not connected with the two common-carrier tracks.

We think that in that same decision the controlling features were stated as follows by the Commission, where you say:

"Rather, the question for decision is whether the obligation to remove the obstacles, both legal and physical, which concededly now prevent operation over the spur track, legally rests with the defendant or with the complainant. That clearly depends upon whether the spur track is a part of defendant's own track facilities and made available by it for public use, or is a private industrial track. If the former, the duty is upon defendant to keep it open for public use, and complainant, as well as other shippers, would be entitled to needed services over that track."

Now, let us see how that matches up. Let us see whether this track is a part of defendant's own track facilities. It merely connects two parts of the New York Central. From a legal standpoint this 1,619 feet might as well be somewhere between Toledo and Sandusky.

Commr. ALLDREDGE. May I interject? Was the Com-
864 mission trying to distinguish its powers there under sections 19 and 14?

Mr. RYNDER. Section 19—that is the one about obtaining a connection?

Commr. ALLDREDGE. And operation of a private sidetrack.

Mr. RYNDER. Well, I have since this case started doubted the effect of that particular section because the track connection is already here. We are not asking that it be made.

Commr. ALLDREDGE. But section 19 goes on and says, "The carriers to furnish cars through the movement of traffic to the best

of its ability without discrimination in favor of or against any such shipper."

Mr. RYNDER. I think a carrier might be violating the latter part of that section in failing to furnish the cars without discrimination, and here they are not operating them as to livestock. True, they are operating as to other commodities.

Commr. ALLDREDGE. In that case you cited I was wondering whether the Commission predicated its conclusions on section 19 or section 14.

Mr. RYNDER. Well, Mr. Commissioner, in that case, if I may use this 1,619 feet as illustrative of the condition at Chicago, the use of that track had been enjoined by the Supreme Court of the State. That was one obstacle. The railroad was not operating over it. That track did not connect a part of the B. & O. with another part of the B. & O.

865 Chairman ROGERS. There was a physical obstruction there, too, which made it impossible for the carrier to operate?

Mr. RYNDER. That is right.

Commr. ALLDREDGE. Is your complaint here under section 19 or setction 14, or both of them? You have a private sidetrack here, don't you?

Mr. RYNDER. This is our private track from T to V on Exhibit 12.

Commr. ALLDREDGE. You want service to and from that track and partly over it?

Mr. RYNDER. Yes, sir.

Commr. ALLDREDGE. Are you claiming that under section 19?

Mr. RYNDER. Well, if Your Honor please, it follows this red line, that is the New York Central line, up to our plant boundary. The green line beyond is our private side track. We are connected not with the 1,619 feet but with the New York Central. Now, the New York Central has not refused a switch connection to us.

Commr. ALLDREDGE. Has it refused to operate over it?

Mr. RYNDER. It has not refused to operate over it except as to livestock. It is bringing in all our supplies, except livestock. we may have to ship from that plant, except livestock.

Commr. BARNARD. Well, that has been done by the Stock Yards Company. It is doing that, it has reserved the right

866 to do that.

The thing, Mr. Rynder, that seems to impress me, that I would like to have your views about, I think your quarrel is with the Stock Yards Company and not with the New York Central. They can't do anythinng else about this situation if that

is a valid lease. If you can make your peace with the Stock Yards Company, then the situation might be different.

Mr. RYNDER. If the majority of the Commission is of your opinion then I am through.

Commr. BARNARD. Well, if that is a valid lease they have the right to restrict the use of that track to what they want. It is not a railroad.

Mr. RYNDER. I think I had better come to that point. If it is a valid lease, would Your Honor contend that this tank car company can lease its cars to the Baltimore & Ohio or the Santa Fe, or its refrigerator cars, as it does, and say in that lease, "You shall not use these to carry the shipments of the Georgia Peach Growers Association"?

I say no; that when a man puts his property to a public use he must take with it the burdens that the law imposes upon that public use of the property.

Unfortunately, one of my clients was among the earliest to find that out, about the time your Interstate Commerce Act became effective, when they had a contract to carry meat from the Missouri River to New York for about 35 cents, or something
867 like that, and it was a perfectly valid contract. They continued to operate under it although the carriers in filing tariffs filed a higher rate. It was certainly a valid lease when it was made, but the courts held that it became invalid by operation of law.

Now, coming to the point that Commissioner Barnard has just mentioned—and I am skipping by a part of my exceptions under which I think we are clearly entitled to an order under section 3 and section 2 and under the decision in Richmond Chamber of Commerce against S. A. L. Railway, 44 I. C. C. 455, and several other cases that I have there mentioned. I would like now to get to the point Commissioner Barnard has just raised.

I do not think when you lease your facilities to a railroad, especially after the passage of the law, you can make a valid lease that will bring about violations of the law. Let me now try to pursue that point.

I would like to invite your attention first to the exact language of section 1 (3) of the Act, defining a railroad.

"The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad and also all the road in use by any common carrier operating a railroad, whether owned or operated under
a contract, agreement, or lease, and also all switches, spurs,
868 tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or

property designated herein, including all freight depots, yards * * *."

In other words, once that track has been put in the public service—and it has been put into that service for something over 35 years and is still in the public service—it becomes a part of the railroad and must be operated by the railroad under all its obligations as a common carrier, both as to the duties required to be performed and as to the avoidance of discrimination or undue prejudice.

Commr. BARNARD. Without the railroad having any interest in it financially at all?

Mr. RYNDER. Oh, it has an interest in it financially. It enables it to serve seven industries which give it business.

Commr. BARNARD. I am not speaking of that kind of interest, I am speaking of ownership interest.

Mr. RYNDER. It has no ownership, no, but it is maintained and it has been maintained for 35 years.

Commr. BARNARD. You think that is a dedication under the lease arrangement made with the New York Central? Do you think that amounts to a dedication?

Mr. RYNDER. I hope to show you in one case it certainly has been so held.

The New York Central has maintained that track for 35
869 years without expense to the Stock Yards Company.

Commr. BARNARD. Of course that is part of the lease arrangement. The Stock Yards pays the tax and keeps up everything else.

Commr. ALLDREDGE. I do not mean to interrupt your argument, but there is one thing I am particularly interested in.

I do not see that the Examiner specifically discussed the possible obligations of the carrier under its sidetrack contract, reviewed in the light of section 1 (9).

Mr. RYNDER. No; I do not think that is mentioned.

Commr. ALDREDGE. In making this contract for the operation of this sidetrack, did the New York Central in that contract make any reservations about switching the livestock to you?

Mr. RYNDER. No; not in the early years. I think in 1935 they amended their contract by putting in that clause that I mentioned a while ago about not being used for competitive traffic.

Commr. ALLDREDGE. In other words, when they made the contract to operate your private sidetrack, they did insert the reservation about not furnishing the services for the cars on competitive traffic?

Mr. RYNDER. That was not in existence from 1910 to 1935.

Commr. Barnard: That was because you were carrying on a different kind of arrangement. You were worth something

870 to this Stock Yards Company then, but you are not any more. Didn't they have a right to do that?

Mr. RYNDER. Well, I am not arguing the case here between us and the Stock Yards Company.

Commr. BARNARD. I think that is where your quarrel is.

Mr. RYNDER. Well, if you are correct, of course, Your Honor, there is nothing to my argument.

There is nothing in section 1 (3) that says that the track used by the railroad company, in order to become a part of the railroad subject to your jurisdiction, must be condemned or dedicated. The only condition is that it must be used or necessary.

There was a case out at Denver which I think is very much in point as to the question you have been asking; that is the Ayers Mercantile Company case.

Now, there we did not have the trunk-line railroad connected on the end of a private sidetrack. The Ayers Company owned a private sidetrack which went into its industry and into several other industries. It sought to enjoin the use of that track, which was its own private track, by the Union Pacific to reach industries beyond.

The court said:

"This railroad company had an established line of railroad through the city of Denver, and the tracks upon Blake Street authorized by the ordinance were spur tracks from
871 its main track for the benefit of parties who expected to build warehouses on vacant property abutting upon that street. * * * The suggestion that the license was unauthorized because the permitted tracks were not for public but for private use, cannot prevail. In a sense every spur track to a private warehouse, manufacturing or trading establishment, is for the private use of those who own and conduct the business therein. But, in a larger sense, and in the true sense, every such railroad track is for the public use and for the public benefit, because it enables the public to exchange its commodities for those of the parties who conduct their business upon the track in a more facile and economical way."

Then, at that point the court said:

"Even granting the contention that the original occupation was permissive, the character of operation might change, as apparently it did here. The gates ceased to exist after 3 years. The railroad company added additional burdens to the trackage in the way of switch-back movements, which were a part of its general switching system, and, according to the evidence, these switch-back movements to the other industries occurred every day."

It is exactly the situation you have here and over private track of a man who owned the track and owned the land and was trying

to enjoin the railroad company for that reason from running its engines over and making deliveries.

872 Now, there is no doubt that this track has been devoted to the public service from at least 1910 until the present date as to all traffic, except livestock, and from 1910 to 1938 also covering livestock.

I think one of the most informative cases on that subject is the Union Lime Company against the Chicago and North Western, 233 U. S. 211. The question there was the right of a railroad to condemn land to run a sidetrack across the owner's land to an industry just beyond. That right was fought upon the ground at that time on the basis it was for a private use. The Supreme Court said:

"Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track or change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent, and not the nature, of its use—the track is nonetheless a part of the avenue through which the commodities reach the public."

Commr. Barnard. Does your complaint allege a violation

873 of section 19 (a)?

Mr. Rynder. No, sir; and I think I have explained the primary reason for that, that we are not refused a track connection.

Then continuing, the Court said:

"It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of an industry and the trade which may warrant the building of a branch track, and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But nonetheless, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service, and are subject to the regulation of public authority."

I have cited on that point several more cases. One is Morgan Run Railway Company against Public Utilities Commission, 120

Northeastern 295. I wish you would read at least what I have in my exceptions about it, because it was decided
874 in Ohio under a statute very similar to your own.

We have had very recently a case that came up in Illinois, Alton Railway against Illinois Commerce Commission, 305 U. S. 348. There the Court said:

"The switch track in question extends from the carrier's main line"—and so forth, to certain other industries. It goes further and says, "upon land largely, if not wholly, owned by that company"—that is, the Peoples Gas and Light Company.

Alton was trying to get rid of the operation of that track, and the Court said, referring to the Alton argument:

"But, in making that and similar arguments, appellant ignores the decision in this case of the Commission, the State Supreme Court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and across public thoroughfares; a track that has become a part of the main line of the carrier's system, and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used, with extensions if any shall be made, to serve the public at large."

That is a case certainly similar in principle to the one I have here.

Now, this 1,619 feet of track does not run to our plant
875 but to a connection with the New York Central, and has been used in the public service since 1910 at least. Until 1938 there was no attempt to restrict the use of the track for any purpose, and since 1938 the track has been used to serve seven industries in all other respects except livestock.

The 1,619 feet of track is not a part of the sidetrack serving the Swift plant. The Swift siding is connected with a track of New York Central ownership.

I believe such a use of the track by the New York Central over that period of years constitutes a public use, and that even though the track may not have been formally condemned or dedicated, it has been for that period of time devoted to public use, namely, all classes of traffic to a growing group of industries which finally have become seven.

Now, in concluding the argument, I would like to make one request of the Commission. If you should sustain what Commissioner Barnard evidently has in mind, I would appreciate it very much if the decision were placed upon that basis.

On the other hand, if you should decide in substance that there is a violation here of the Interstate Commerce Commission Act, which you may well do, but you have not the power to make an

order under section 1 (4), may I take the liberty of asking the Commission to state that unequivocally, because if lack of power be the stumbling block, then I should like to be able to pur-
876 sue the case in court untrammeled by an inability to distinguish upon which ground the case is dismissed, if it should be dismissed.

I would like to save whatever time I have for my reply.

Mr. PIERCE. If the Commissioners please, is it satisfactory if Mr. Farmer, on behalf of the Stock Yards Company, appears at this time? We had an agreement between us to divide the time allotted to the defendants.

Chairman ROGERS. That will be all right.

Argument of Matthews S. Farmer

Mr. FARMER. If the Commission please:

Those points upon which the Cleveland Union Stock Yards Company disagrees with the Examiner's proposed report were of such a very minor nature as not to justify the filing of exceptions, which the Stock Yards Company has not done. It has, however, taken the liberty to reply to the exceptions as filed by Mr. Rynder on behalf of Swift and Company.

I shall not take a great deal of time because I believe that this controversy, as has been suggested by this Commission, has developed into a quarrel betwen the railroad and Swift and Company.

Before beginning my argument I desire to answer just two or three of the points which Mr. Rynder made.

He was asked if the Stock Yards Company did not have a right to enter into a sidetrack agreement with the New York Cen-
877 tral to limit the use of it to business that was not competitive. His answer was that he believed that the Stock Yards Company had no such right because it entailed a discrimination.

Now, I say to this Commission that these seven industries that he talked about, which must use this 1,619 feet for service, have all of the same rights and privileges and are limited in the same manner as Swift and Company.

Commr. PORTER. The limitation does not amount to anything to them, does it?

Mr. FARMER. Yes.

Commr. PORTER. As to livestock?

Mr. FARMER. Yes; they cannot do it either. It just so happens they do not try to bring in much. Swift and Company does, but it so happens that some of the other packers do not try to bring

in livestock, but they cannot do it. They are limited just as Swift and Company is limtied.

Chairman ROGERS. What is the purpose of that limitation? Is it to force the use of the stockyards?

Mr. FARMER. Yes; that is what the stockyards were built for. It is under the Packers and Stock Yards Act, it is a public market. This whole business and whole enterprise out there is engaged in livestock, and to use a track right in front of its property and on its land that it pays taxes on, pays taxes on the land and on improvements, and then, in spite of that, they say this is a
878 public dedication. As I understand a public dedication by permitting the use, it must be allowing the use of it to the general public and in such manner that it is inconsistent with any other theory of ownership or control.

This record is replete with evidence from the very beginning, 1910 and even before that—and I think the first agreement goes back to May 10, 1899. It has always been by agreement and always has had a cancellation clause in it, so the Stock Yards Company, if it saw fit to do so today, could, by the exercise of its ownership, cancel on 30 days' notice for all purposes.

Commr. PORTER. Without the consent of this Commission?

Mr. FARMER. I think so.

Chairman ROGERS. Then what would happen if they did?

Mr. FARMER. That would open the door, naturally. It would inconvenience the packers and everybody out there, because they do get coal and salt and hides and various other things.

Chairman ROGERS. By means of this lease?

Mr. FARMER. It is not a lease; it is a mere sidetrack agreement.

Chairman ROGERS. By means of that the New York Central dictates as to where it gets its livestock, doesn't it?

Mr. FARMER. No; it does not.

Chairman ROGERS. How do you get around it?

879 Mr. FARMER. The New York Central does not dictate to Swift and Company where it gets its livestock, or anything about it. It says the Stock Yards Company has limited the use of the track so they cannot deliver stock, livestock, to Swift and Company. It can be delivered through the Stock Yards Company some 1,600 or 1,700 feet up the street, and has been for years and years. Swift and Company, up until 1936, I think it was, was a member on the board of directors of the Cleveland Union Stock Yards Company, until by court action they were forced to dissolve, I think it was by the Court of Appeals of the District of Columbia.

I am not going into all these various sidetrack agreements, not only with Swift and Company but the other packers similarly located.

Commr. BARNARD. What do you say about Mr. Ryder's position that this traffic is not competitive with the Stock Yards Company?

Mr. FARMER. I say this, Your Honor. He has quoted at length dictionary definitions and so forth as to what was meant by that phrase in the sidetrack agreement, that it could not be used for competitive business.

Now, this sidetrack was not built for the general public. What interpretation the general public might have, or whatever any dictionary might say about what competitive business is,
880 has nothing to do with the situation as it existed between the contracting parties, the stockyards, and the railroad. They understood definitely and certainly that the denial of the use of it for competitive business meant the hauling of livestock over that track to Swift and Company or any other company. They understood that and they acted upon it and that is the reason that he is here now, because they acted upon it.

They notified the New York Central they would not permit it. They were losing their business and they might as well close up their doors if you would permit a thing of that kind. One of the biggest industries in Cleveland might as well close its doors if you would require them to furnish the use of that track for deliveries to these plants.

Now, then, if there was any doubt about it, on December 31, 1934, the Stockyards Company wrote a letter to C. M. Williams, superintendent of New York Central, which in part says:

"Competitive traffic includes certainly livestock and probably in-bound movement of meat."

Now, go beyond that a little bit, if you please, and think of it in the literal sense, of competitive business.

If any railroad uses this 1,619 feet of the stockyards' property on which it is paying taxes, not only on its land but on the improvements, to the State of Ohio, if it uses that for the purpose of making a delivery to Swift and Company which they
881 must accept through the Stock Yards Company and from which the Stock Yards Company would derive revenue, I ask you, under any fair interpretation or definition of competitive business, if that is not competitive.

Chairman ROGERS. How much track would the New York Central have to build in order to serve Swift without using the track in question?

Mr. FARMER. I suppose the same distance; I do not know. It would be at least that much.

Commr. ALLDREDGE. I am thinking now, if your argument is correct, that this is competitive with Swift, I am wondering whether or not this contract or the practice of the New York

Central is not running right into the teeth of section 19 when it says that those private sidetracks shall be operated in such a manner, to the best of the ability of the carrier, without discrimination in favor of or against any shipper.

Mr. FARMER. There is no discrimination.

There is no discrimination against anybody. Any packer in that stock yards district, the same or similarly located, is under the same restriction.

Commr. ALLDREDGE. The Examiner was wrong, then, when he said it was a violation of section 19 that was alleged?

Commr. BARNARD. I asked Mr. Rynder and he said he was not complaining under section 19.

Isn't that what you said?

Chairmain ROGERS. The Examiner said in the first page
882 of his report, "Violations of sections 13, 14, 15, 9, 18, 19, and 20" and so on are alleged.

Commr. BARNARD. Then counsel for the complainant does not know what he has in his complaint.

Mr. FARMER. The El Dorado case was cited here as an authority for making an order against the Stock Yards Company. In that case the tank car company was involved, and I want to read what the Supreme Court said in that respect. This is by Justice Roberts, who I believe commands the respect of everybody.

"Freight cars or facilities of transportation"—this is, as I say, in the case of General American Tank Car Corporation vs. El Dorado Terminal Company, and I will quote:

"Railroads are under obligation as part of their public service to furnish these facilities upon reasonable request of the shipper and therefore have the exclusive right to furnish them. They are not, however, under obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public, and if carriers do so lease the cars, the terms on which they obtain them are not subject of direct control by the Interstate Commerce Commission. If the carriers pay too much for the hire of such cars, the Commission may, of course, refuse to allow them to reflect such excess cost in the tariffs. The lessor of such
883 cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore, its practices lie without the realm of the Commission's existence."

Chairman ROGERS. What case is that?

Mr. FARMER. General American Tank Car Corporation.

Commr. ALLDREDGE. That related to the method by which railroads obtain the equipment they use.

Mr. FARMER. That is right.

Now, then, the railroad is in this position. Swift and Company

is trying to have the railroad appropriate the Stock Yards Company property for something which would put them out of business, and I say that the right of eminent domain is involved squarely in this case. You cannot take the Stock Yards' property, that property which it has rented on sidetrack agreement always with the cancellation clause in it, and confined to business which is not competitive.

Commr. ALLDREDGE. Section 19 says that those sidetracks shall be operated and cars furnished for service thereon without discrimination.

Mr. FARMER. That is right.

Commr. ALLDREDGE. If the Commission has the matter presented to it and it finds that, lease provisions or no lease provisions, there is discrimination, what is the Commission's duty under the Act?

884 Mr. FARMER. Would the order to the Stock Yards Company be for it to permit the New York Central to use the track, or other railroad companies, without compensation? The Fifth and Fourteenth Amendments to the Constitution of the United States are entirely involved in this case, and if it came up we would be entitled to a jury trial.

I want you to look at this map. Here is Sixty-fifth Street, one of the prominent thoroughfares of the West Side of Cleveland, traffic moving from the Lake area clear into the south highways, branching out everywhere. Here [indicating] is the front part of the Cleveland Union Stock Yards Company's property. It is valuable property, if you please. By a mere order of this Commission, if it saw fit, would the Stock Yards Company have to donate that property for the service of Swift and Company? Would they have to do that without compensation? Must it pay taxes on the land and on improvements without the least consideration being given to that fact and without a trial by jury, as they must have under the Federal Constitution, or a trial by jury under the Ohio State Constitution?

Now, this section 42, the Elkins Act, is certainly loosely drawn. I do not believe would disagree with that.

I cannot and do not believe anybody can seriously contend that you can donate the Stock Yards property so as to have delivery of livestock to Swift and Company.

885 Mr. Rynder objects to the finding of the Examiner as to the fact that the Stock Yards Company is under the Department of Agriculture. Well, it is; there is no question about it, a stockyards company is clearly under the Department of Agriculture.

Now there is a provision, of course, that there shall be no conflict as between the Secretary of Agriculture and the Interstate

Commerce Commission. But if I understand anything at all about the litigation which has arisen out of this stockyards question, it is that this Commission has jurisdiction only under section 15 (5) of the loading and unloading of livestock, and that is not involved on this track.

Commr. MAHAFFIE. What kind of payment is provided for the use of this track under the sidetrack agreement?

Mr. FARMER. None; there is no provision for the payment of taxes by the carrier, or anything else.

These people live out here as a sort of happy family, we hope, and we hope they will continue that way. They have got to favor one another. It is certainly common, ordinary business prudence for the Stock Yards Company, if it has a track and as long as it does not inconvenience them, or as long as they do not want to sell their property, to let others use it for the purpose of hauling their hides and so on. But, by the same token, it is also common, ordinary business prudence not to let them use it to drive them out of business.

886 Commr. MAHAFFIE. Are these other concerns located along the track also customers of the Stock Yards Company?

Mr. FARMER. Yes.

Commr. MAHAFFIE. Is there anything improper about your furnishing free facilities for their use that are not for the use of others? There is no discrimination?

Mr. FARMER. I say Swift and Company is treated exactly as everybody else. There is no complaint as to that.

Commr. MAHAFFIE. Suppose they are all customers of yours and you are a public utility and you furnish them free, valuable facilities. Is that all right under the Stock Yards Act?

Mr. FARMER. Are you confining that? I think that is a purely private enterprise, we can do it or not.

Commr. MAHAFFIE. I thought you were a public utility.

Mr. FARMER. Yes; we are a public utility as far as the stockyards are concerned, but this is a private industrial track, you might call it.

Commr. MAHAFFIE. It is part of your plant as a stockyards company.

Mr. FARMER. Yes.

Commr. MAHAFFIE. My point is, as a stockyards company, as a public utility, and in a position to furnish free to its customers facilities that are part of its plant.

Mr. FARMER. I think it can. This Commission has held—I cannot recall the case at the moment; it is in the New York

887 Central's brief—this Commission has held with respect

to a sidetrack, private sidetrack, the railroad has the right to furnish it or withhold its use, as it sees fit.

Mr. RYNDER. Would you mind if I asked one question for clarification?

In what you say as to all being treated the same, I take it you mean in industries connected with the 1,619 feet of track, but you are not trying to say the three packers located north of that are also included?

Mr. FARMER. I am not trying to say that. I am saying, as I understand your charge of discrimination, that is not so. There are three packers, however, who are located right on the main line of the railroad and, of course, they are served by the railroad on the main line.

What I am saying now is that all these people down here [indicating], who must use the 1,619 feet of the stockyards track, if they are to get deliveries of livestock or railroad service, are the same or similarly situated.

Commr. BARNARD. They all get the same treatment?

Mr. FARMER. Absolutely the same treatment.

I say again, and I want to repeat it, those located down here use this 1,619 feet of stockyards property and enjoy the same rights, the same privileges, the same treatment as Swift and Company who is also located there.

Commr. ALLDREDGE. If we are going to consider discrimi-
888 nation, do they enjoy the same privileges as the stockyards?

Mr. FARMER. With respect to everything except livestock. But that is the business of the livestock yards, Mr. Commissioner.

Commr. ALLDREDGE. You said the stockyards were competitors with them as far as livestock?

Mr. FARMER. I said that was competitive business. I have never said or argued that there was competition of Swift and Company with the stockyards. We do not slaughter, we do not sell meat, we do not do anything of that kind. But I do say, under section 15 (5), that it is the obligation of the carrier to unload, and the railroads use the stockyards as their depot, that is the only place they unload livestock in the whole city of Cleveland. What I say is that the stockyards would enjoy the revenue if Swift and Company took its deliveries through the pens, the purpose for which they were built, its business, and it is regulated by the Department of Agriculture.

Commr. ALLDREDGE. In buying livestock are these packers competitive with the stockyards?

Mr. FARMER. No; as the Stock Yards Company does not buy or sell livestock, nor meat or anything of that kind.

Commr. ALLDREDGE. You spoke of competition. Just what does

that mean? Competitors have to engage in business to make competition.

889 Mr. FARMER. First of all I argued it did not make any difference what the dictionary says competition is. When they used the clause, the railroads understood and the Stock Yards Company intended them to understand that they could not use the 1,619 feet for delivery of livestock directly to plants of packers.

Commr. ALLDREDGE. Because that is competitive business?

Mr. FARMER. Because they used the words "competitive business." How is it competitive? In this sense only, and I hope the Commissioner will understand this, if they use the Stock Yards Company's track for a direct delivery to any of these fellows down here [indicating], any of these packers, then the railroads have passed by the depot, which happens to be the stockyards pens, and the Stock Yards Company enjoys the revenue from those pens. That is what they meant by "competitive business," regardless of any technical interpretation or definition of English you may apply. It is not competitive in the general sense; however, it would not be correct if you thought it did not prohibit the use of these tracks to deliver livestock to the packers.

Commr. ALLDREDGE. You did it under a term referred to as "competitive business."

Mr. FARMER. What difference does it make? They understood if they delivered livestock, that meant competitive business.

890 Commr. ALLDREDGE. It makes a lot of difference if we are trying to determine whether there is discrimination here.

Mr. FARMER. I think not.

I say there is no discrimination with anybody who is the same or similarly located on this track, who requires the services of this 1,619 feet.

We cannot deny the fact that Long Dressed Beef Company and two others are on the main line of the New York Central and they can get their livestock. We could not say to the New York Central, "You cannot deliver to those fellows on your main line," because that would not involve us.

Commr. BARNARD. If there should be such a thing as discrimination, the New York Central Railroad is not responsible for that, is it?

Mr. FARMER. No.

Commr. BARNARD. The Stock Yards Company is responsible?

Mr. FARMER. That would be correct. That is my opinion.

Commr. ALLDREDGE. That would be a nice way out if the railroad entered into contracts all over this country that had all sorts of clauses in them, that would permit the railroad to escape.

Mr. FARMER. I do not think there is any such thing of any such magnitude involved here, Mr. Commissioner, and I do not see how you can consider it that way. It is purely a private sidetrack they own.

891 Commr. ALLDREDGE. This law relates to private sidetracks particularly and it says that they shall be operated by the railroad without discrimination.

Mr. FARMER. It also says, if you are going to say "private sidetrack," it could be abandoned without the consent of this Commission.

Commr. ALLDREDGE. What difference does that make, as long as the sidetrack is being operated and the law lays down the duty to the carrier as long as it is being operated? What difference does it make whether it were an abandoned track or not?

Mr. FARMER. I say that the Examiner has not held it was an abandoned track as far as this service was concerned.

Commr. ALLDREDGE. Why don't you give me an answer in response to legitimate questions? What about this law? It is our duty to administer it, isn't that so?

Mr. FARMER. I do not think the law means to compel the Cleveland Union Stock Yards Company to furnish its private track to Swift and Company or any other packer for the unloading of livestock. I do not think it means that.

Commr. ALLDREDGE. I did not ask you that. I asked you about the carrier's duty, that permitted itself to be tied up with a contract where it could not perform the service without discrimination.

Mr. FARMER. I assume they were in perfectly good faith about it. I think they felt that the Stock Yards Company had a right to make that contract. It is purely, as I say, a contract that can be canceled in 30 days.

I say that this Commission has no jurisdiction over the Stock Yards Company in this respect, that they cannot take its private property for private use any circumstances; that they cannot take this property for public use under any circumstances, because it has no jurisdiction. That must be done, if at all, through the courts with properly exercised powers involving the question of eminent domain with a right of trial by jury and all those things.

Chairman ROGERS. Mr. Farmer, can you tell me just briefly, to clarify my mind a bit, how would it save Swift any money if this traffic was handled as Mr. Rynder wants it to be?

Mr. FARMER. I do not know, I cannot answer your question.

Chairman ROGERS. What would be the difference in the method if it were handled like Mr. Rynder wants it to be and in the method it is now handled?

Mr. FARMER. The difference would be, it would be unloaded in

chutes of Swift and Company directly by virtue of the use of this track.

Chairman Rogers. Where are those chutes located?

Mr. Farmer. Swift and Company, over here [indicating], on this green line.

892 Chairman Rogers. How much of the track would they have to use in order to get over to those pens?

Mr. Farmer. 1,619 feet, right here in front of the stock yards.

Commr. Manahan. You mean they have to come in that way?

Mr. Farmer. Yes. Here [indicating] is the main line of the Big Four, the New York Central. This entire yellow line is a track of the Stock Yards Company on which it pays taxes, not only on the land but for the improvements which are separately appraised and assessed.

Chairman Rogers. Just to make it clear in the illustration, if, for example, this red line were drawn on up and connected in with the main line, assuming that there were possible and were done over at the Swift plant, then they could serve Swift directly and you would not be involved?

Mr. Farmer. You mean if they would run Sixty-first Street? If they connect with the main line of the New York Central, they would not be using our track. There was some effort made to do that, to come over through Sixty-first Street, but I think the courts of Cleveland enjoined it.

Chairman Rogers. The Commission would have power to order that, probably.

Mr. Farmer. It would be over a street of the City of Cleveland. They would have to condemn part of the Lake Erie Provision Company in order to make connection with the

893 main line.

Chairman Rogers. If they were served directly into their pens, they would eliminate certain fees they now have to pay the Stock Yards Company?

Mr. Farmer. The railroad? It is a duty under 15 (5), where they unload at the pens, unload into suitable pens at the stockyards without an additional charge.

Commr. Mitten. Swift and Company has to pay some extra stockyards fee?

Mr. Farmer. Yes; there is a little yardage charge; I do not know what the tariff is, myself, but there is some yardage charge. I assume, of course—well, I won't go into that.

You asked me the question, what I thought as to whether they would have to pay something. I assume that the Stock Yards Company under those circumstances at any event would have to charge something for its railroad. They are losing business all the time.

I have taken more time than I intended from Mr. Pierce.

Mr. RYNDER. Mr. Pierce kindly said I might take one minute of my own time to clear up this question of whether we allege a violation of section 19. It was not so alleged in the original complaint, but in my brief of October 2, 1944, in the summary, I alleged violation of that section, and I understand in the
894 practice before the Commission that is sufficient to raise the question.

Commr. SPLAWN. While you are here, I would like to raise a question.

When you buy cattle in the stockyards, you buy cattle that are unloaded by the railroad into the loading pens adjacent to these stockyards, is that right?

Mr. RYNDER. You mean when we buy it on Stock Yards property? Yes.

Commr. SPLAWN. The railroad discharges its duty when it unloads the stock at its pens adjacent to the stockyards; is that right?

Mr. RYNDER. Well, you understand, that is stock consigned to a commission merchant.

Commr. SPLAWN. The railroad has discharged its duty?

Mr. RYNDER. Let us say Jones, a commission man operating in the Cleveland Stock Yards, says, "Deliver my stock at so and so track in the Cleveland Union Stock Yards," so that I do not see how there can be any question about it. The railway has taken the property to the place it is consigned to.

Commr. SPLAWN. That is a railway depot, in other words, a lawful station, a lawful delivery when it delivers the stock into the unloading pens, and go into the stockyards, and you then purchase them in the stockyards; is that right?

Mr. RYNDER. Yes. But it is not the only one. The Stock Yards has not by any tariff said it is an exclusive delivery
895 place. As I pointed out, it is not contested that the live-stock is delivered to these three packers immediately north of the stockyards, not passing through the stockyards property.

Commr. SPLAWN. They deliver at the stockyards, or a temporary track, any place that the consignee will take them that is on their line. But in the same train there will be one carload of cattle which is unloaded into the unloading pens of the stockyards, and you buy them and deliver them into your packing plant from the stockyards. On the same train you might have a carload which you acquired before it reached the stockyards, and that stock is being brought by the same train.

Now, as I understand it, you insist it is the duty of the railroad to spot that car through the stockyards plant to your private siding; is that right?

Mr. RYNDER. The railroad tariff so provides, beyond any question, at the present time.

Commr. SPLAWN. I am not deciding the case, I am just trying to get that point as to whether or not that is a lawful delivery of the cattle.

Mr. RYNDER. If two cars came in the same train, one consigned to Jones and another to the XYZ Lumber Company, I think a lawful delivery might require the delivery of the two cars to the individual consignees.

896 Commr. SPLAWN. If you acquire cattle in the stockyards from this commission merchant, do you have to pay anything for driving them over to your place?

Mr. RYNDER. A charge is paid, although not by us. The Stock Yards Company has what is called yardage charges which are collected from the commission merchant rather than the purchaser.

It is our position that the Cleveland Union Stock Yards Company, as well as our company, took the position for some years that we were entitled to egress from the stockyards without extra charge above the railroad rate, based on the old Government stockyards case. You decided against us in 1943. Up to that period it did not matter to us, from the standpoint of paying any fee, whether the car came over to our private sidetrack or unloaded into the stockyards and then we would drive it over. It made no difference to us up to that time, and the business was divided, dependent on the matter of convenience.

Commr. PATTERSON. You would accept them at that time at either place?

Mr. RYNDER. Yes, sir.

Chairman ROGERS. Mr. Pierce.

Argument by Robert R. Pierce

Mr. PIERCE. If the Commissioners please:

897 I should like to attempt to clear up several points here which some of the Commissioners have manifested some interest in.

Commissioner Patterson manifested interest as to when Swift started to have cars switched over this 1,619 feet of track, over to the one unloading door. They have one unloading door here [indicating] for unloading livestock, and they can only spot one car at a time. They did not start that, Mr. Commissioner, until 1930, along around 1930 and '31.

In 1916 Swift and Company had purchased 6½ percent stock ownership in the Cleveland Union Stock Yards. In 1924 the District Court ordered them to divert themselves of that owner-

ship. From that time the happy family over at the Cleveland yards was not quite so happy as it had been theretofore.

In 1930 Swift apparently did not want to take its stock through the stockyards loading and unloading pens, and they wanted their stock placed over here [indicating] at this one unloading door. There is only one door there, and the pens in Swift's plant are way over here [indicating]. So, the stock is unloaded from the red track.

The green track on the east side of Sixty-first Street is their power plant and other operations.

Their packing plant and the few pens they have there serve mainly for stock brought in by truck and are located right over here [indicating], next to West Sixty-fifth Street.

Swift and Company uses those pens almost entirely for
897 truck deliveries of livestock. They have their stock unloaded over in the stockyards because they want it stored there and kept until they are ready to slaughter. Then they drive it across the street to their stockyards. That has been their practice for years.

Commr. PATTERSON. Was that the practice with respect to direct shipments as well as with respect to stock they buy on the market?

Mr. PRINCE. Yes; that is right.

Since beginning 1930, I believe in a period of 2½ years they reconsigned or redirected about 1,131 cars, which were taken over here instead of through the stockyards. It got to be such a volume, the Stock Yards saw they were losing revenue over it, so they said to the railroad, "Well, we own this track, and you just do not handle any more livestock over there, it is competitive business, it is taking revenue away from us."

That is the way in which it is competitive, Mr. Commissioner.

Commr. ALLDREDGE. In that it takes revenue away from the stockyards because it does not handle the stock through the unloading pens.

May I ask whether you concede that section 19—a violation thereunder—has been duly tendered as an issue here in this proceeding?

899 Mr. PRINCE. I do not believe it is, Mr. Commissioner.

As I recall, we were before the Commission here on January 4, 1943, and I know you had the impression at that time that, from the argument being presented by Mr. Ryder, section 19 was involved. But I do not believe it is here in the case.

The service here is rendered by the New York Central to the extent the Stock Yards will permit them to render it over that track. We are the innocent victims here, I might say.

Commr. PORTER. Is it your position that because paragraph (9)

of 1 was not alleged in the complaint, that when it comes to the decision we cannot consider that section?

Mr. PIERCE. No; it is in the picture if you want to consider it.

Commr. PORTER. That is what I mean.

Mr. PIERCE. Yes; absolutely.

But so far as facts concerned here, I do not see where it is in the picture.

Commr. PORTER. I assume, of course, if the facts brought out on the record are such, then, of course, we are at perfect liberty to consider any section of the Act.

Mr. PIERCE. Absolutely, yes; whether it is alleged or not.

Commr. SEAWELL. You have a track, as I understand it, along Swift's plant, with which they have connected with the spur
900 at the plant. If you get the cars over to your own track adjacent to the Swift plant, then it would be your duty to spot them on their sidetrack, as they require?

Mr. PIERCE. Yes; that is true.

Now, if I may explain along that line—and the record shows this very conclusively—back in 1905 Swift and Company bought the Peoples Packing Company which was located along West Sixty-third Street. It is here [indicating]. Now, they had no track connection. They tried to figure out a track connection across West Sixty-fifth Street and they ran into the situation that this was Stock Yards Company property and Stock Yards Company track.

In 1908 Swift and Company procured an ordinance from the City of Cleveland granting a permit for the Big Four to build a connection direct with the Big Four main track up here and to come down West Sixty-third Street to its plant and thereby avoid the stockyards.

Well, after that ordinance was granted, the Lake Erie Provision Company, located right in here, got out an injunction and said they did not want Swift and Company to do that.

Chairman ROGERS. You have a gap up there, Mr. Pierce?

Mr. PIERCE. About 300 feet; 350 feet.

Well; after Lake Erie Provision got that injunction—that was a temporary injunction and that was later removed. Swift and Company got the New York Central Railroad, or the Big Four
901 at that time to go in and condemn the land of the Lake Erie Provision Company. When they got that land condemned, then there was this situation existing: They could go ahead and put the connection in; Swift and Company could put in a connection, but it was going to cost $24,500 to buy the land that was necessary to build the track up to the right-of-way of the Big Four Railroad. Well, Swift had an arrangement whereby one of the packers down there [indicating] was going to

put up $2,000, another packer $2,000, and they had $5,000 raised to put that connection in, but Swift and Company did not want to put up the balance.

Commr. Lee. What year was that?

Mr. Pierce. Following that, in 1910, Swift's manager wrote to the New York Central traffic manager and said, "It looks like we are not making any progress in getting the track connection for our plant. We think the best thing to do is to get a track across West Sixty-fifth Street, connecting, of course, with this extension of the stockyards track." The Big Four said, "All right, if you will get a permit to use West Sixty-fifth Street and if you will provide the right of way over there, we will build a track, we will extend the stockyards track down here and put a connection in and go over to your plant."

I should say it is over here [indicating] that I am referring to.

That was done. Swift and Company procured an ordi-
901½ nance in 1910 granting a permit to the Big Four Railroad to build this track across West Sixty-fifth Street.

Swift and Company negotiated for a lease from the Stock Yards Company for a little parcel of land east of West Sixty-fifth Street as a right-of-way for their track. Their agent, Mr. Thom, admitted in the record, as their authorized agent, that he tried to get the right-of-way along here [indicating] to build that track for Swift and Company, with full knowledge of the fact we could only use the so-called bridge track on the property of the Stock Yards Company and owned by them and controlled by them.

That is the reason I said that Swift and Company had no right to pose as an innocent shipper wronged by the railroad company. The New York Central is holding the bag between these two contestants.

Commr. Patterson. All those industries south of Sixty-fifth Street developed subsequent to 1910?

Mr. Pierce. Some of them were there about that time, Mr. Patterson. It is not known exactly when some of them did go in.

Commr. Patterson. I am talking about those south of Sixty-fifth Street.

Mr. Pierce. Up here [indicating]?

Commr. Patterson. All those industries along beyond Swift, how were those industries served at that time?

902 Mr. Pierce. They were not served until this track was in there. Some of them were there. Swift and Company bought Reed and several other companies along in there [indicating].

Now, none of those other companies are complaining about

any discrimination or undue prejudice here. They have all understood—and the record shows very clearly—in all these sidetrack agreements there is a termination clause in them the same as there is in the Swift and Company agreement. The Railroad Company said to Swift and Company, "We may have to discontinue service any time to you on this track." There is a 10-day terminating clause in it.

Chairman Rogers. What is the present situation as to that gap of 300 feet? Is it still open?

Mr. Pierce. I think probably the political situation is such they could get it through now.

Chairman Rogers. I did not say "political," I said "present situation." Is there any construction up there or is it still open?

Mr. Pierce. I think it is just about like it was, Mr. Commissioner. There is a move that I happen to know, that is not on the record, where one industry wants to vacate Sixty-third Street north of Stock Avenue because it wants to build a platform. I do not know whether Swift and Company knows about that or not, but that is something which has developed.

903 Chairman Rogers. Would that $24,000 figure be right now?

Mr. Pierce. I do not think it should be any worse.

It seems to me that Swift and Company made its election back in 1910 when it knew all about the conditions of this track, when it tried to get this connection and did not want to spend the money, and when it induced the New York Central to build its track over here [indicating] it knew all about those uncertainties and it made its election at that time to take its chances. It does not make any difference to the New York Central whether this stock is placed at the stockyards unloading pens or whether it is placed over at Swift and Company's plant. We stand ready to deliver it either place. But, because of the barrier placed on this by the Stock Yards, the owner of the track, we are just not able to deliver the stock over there.

Now, Swift and Company has certainly been thoroughly familiar all along as to this situation. They were an owner of stock in the Stock Yards Company from 1916 until 1936. Their Cleveland manager was a director on the board of directors of the Cleveland Union Stock Yards all during that 20 years. The Cleveland manager was a member of the executive committee of the board of directors of the Cleveland Union Stock Yards when they had an executive committee in operation, and their traffic manager was a member of the traffic committee of the Stock

904 Yards. The traffic manager of the Cleveland Provision Company and the traffic manager of Swift and Company were on the traffic committee which was charged with the duty of

expediting traffic in and out the stockyards and handling matters of traffic or transportation. Their man was in the picture all the time and they certainly had known all about this.

Commr. SPLAWN. As to the question of compensation, you do pay for the use of the 1,619 feet, do you not, the use you make of it?

Mr. PIERCE. The Big Four maintains the track for the use of it, for the limited use, I should say, to be very technical. They pay the cost of maintenance.

Comr. SPLAWN. Doesn't it come down to something like this? You as a common carrier entered into a contract with an industry for a partial use of its industrial track, and you hold yourself out as a common carrier to handle all shipments. Now, you say this was all aboveboard and everybody knew about it. But isn't the question we have to examine here, whether or not the Stock Yards Company, by entering into a contract with you, has really made a contract by which you have to haul anything that is tendered?

Mr. PIERCE. I do not think so, Mr. Commissioner, on that point. Now, for instance, we hold ourselves ready, willing, and able to perform this service for them, but the Stock Yards will not,
905 or rather Swift and Company will not obtain consent from the Stock Yards Company to use that track. They say to the Railroad Company, "Well, you go over and make a deal with the Stock Yards. That is your expense, that is included in your line-haul charge. We want you to bring this stock over and place it at our plant because that charge is contemplated as being within your line-haul charge."

The Stock Yards, as I understand it, will extend the use of that track if Swift and Company wants to pay for any livestock shipments shipped over there. That is in the record.

Mr. Baker testified, if they wanted to pay for shipments of livestock to go over that track, they can still have the free use of it.

Commr. PATTERSON. Mr. Pierce, do you think you could lease a car, for instance, for the use of one shipper and refuse to lease a car under similar circumstances for the use of another shipper?

Mr. PIERCE. No; not under similar circumstances.

Commr. PATTERSON. What I have in mind is this. You own very few tank cars. If a shipper wants a tank car, you lease a tank car and furnish it to that shipper. Do you think you could refuse to furnish a tank car to another shipper under like conditions?

Mr. PIERCE. Not if a tank car is available from the tank car company. I do not think you could compel the railroad company to equip itself with a tank car in order to supply
906 that shipper.

Commr. PATTERSON. They do not have tank cars, of

course. But assuming there were plenty of tank cars, do you think you would be required to release a tank car for the use of the shipper if he tendered a shipment of that kind?

Mr. PIERCE. I think that has been in controversy, and as I recall, the Commission held in that case you could not compel them, you could not compel the carrier, to procure that tank car. I am relying on what the Commission said in that case.

Commr. ALLDREDGE. This contract you have with the Stock Yards applies to that 1,619 feet of track marked in yellow there?

Mr. PIERCE. Does it apply to that?

Commr. ALLDREDGE. Yes.

Mr. PIERCE. Yes, sir.

Commr. ALLDREDGE. You use that under contract do you?

Mr. PIERCE. We use that under a contract which includes all of the tracks into the stockyards, all of the tracks which are on stockyards property. This track down here [indicating] is on stockyards property.

Commr. ALLDREDGE. All of that is under one contract?

Mr. PIERCE. That is right; all of the tracks.

Commr. ALLDREDGE. With the stockyards?

Mr. PIERCE. Yes.

907 Commr. ALLDREDGE. Is that the one that has the 30-day cancellation provision in it?

Mr. PIERCE. The contract with the Stock Yards on all the tracks has a 30-day cancellation clause.

Commr. ALLDREDGE. Is there another separate contract with Swift and Company dealing with that part of the track that serves them?

Mr. PIERCE. This part [indicating] or this part over here [indicating]?

Commr. ALLDREDGE. Is that all under one contract with Swift?

Mr. PIERCE. If I may explain, Mr. Commissioner, the Federal Packing and the Peoples Packing had a contract, and Swift took them over. They assumed those contracts. Then, as I recall, in 1930, when Swift assumed those contracts, they wanted some changes made in some of the tracks east of Sixty-third Street. At that time the whole thing was put into one contract with Swift and Company.

Commr. PATTERSON. Which covers all the tracks to the connection?

Commr. ALLDREDGE. Which extends to all the connections, what you call stockyards track?

Mr. PIERCE. Yes.

Commr. ALLDREDGE. That goes under one contract?

Mr. PIERCE. All this for Swift and Company is under

908 one contract.

Commr. ALLDREDGE. By virtue of the use of that yellow track, the Stock Yards Company requires you, or by virtue of the fact that there is a 30-day cancellation notice and some other provisions in your contract with the Stock Yards Company, similar provisions are incorporated in the Swift and Company contract?

Mr. PIERCE. The termination provisions; that is right.

Commr. ALLDREDGE. How about the competitive clause? Is that also in the Swift contract?

Mr. PIERCE. That is only in the Stock Yards contract. That is only in the contract between the railroad and the Stock Yards Company.

Commr. ALLDREDGE. You could not use that 1,619 feet of track competitively with the Stock Yards, or something to that effect?

Mr. PIERCE. For any competitive traffic, yes, sir; that is only in the agreement between the railroads and the Stock Yards Company—or should I say the railroad and the Stock Yards Company?

But in the agreement, in the individual track agreement with Swift, there is this provision: "In the event the second party (that is Swift and Company) sells or leases its said track extension or that portion of said sidetracks Nos. 1 and 2 located on its
909 land east of the east line of West Sixty-third Street, or sells or leases the premises served by any of said sidetracks or extension, the grantor or lessee shall acquire no interest in the tracks of the first party, or right to service upon any of said tracks or extension until he shall have contracted in writing with the first party for such interest or such service."

Commr. ALLDREDGE. Would you permit me to ask you one further question? I do not want to interfere with your argument.

How many industries all told do you serve by the use of that 1,619 feet of stockyards track?

Mr. PIERCE. I think there are eight altogether, Standard Beef, Kreinberg and Krosny, Koblenzer Brothers, Earl C. Gibbs, Hughes Provision Company, Theuren-Norton Provision Company, and Swift and Company.

Commr. ALLDREDGE. Now, there is a possibility of further industries being served and perhaps an extension of those tracks?

Mr. PIERCE. It is getting a little congested over there now.

Commr. ALLDREDGE. Now, all of them are subject to that provision that you cannot handle any business to and from those industries that is competitive with the Stock Yards?

Mr. PIERCE. Yes, sir.

Commr. ALLDREDGE. The reason I am asking you particu-
910 larly about that is that I am familiar with another situation where that sort of tie-up happened and it was eventually necessary to straighten it out.

Is there any practicable way for the New York Central to free itself from that situation there?

Mr. PIERCE. Only if Swift and Company would bring its track up to the right of way of the New York Central here [indicating] to the end of West Sixty-third Street here [indicating]. If they would do that, as they planned to do and made arrangements to do so in 1906, there is no reason why the connection would not be made.

Commr. ALLDREDGE. You say about eight altogether, and that includes the Stock Yards, doesn't it, which would leave seven industries independent of the Stock Yards served by those tracks; is that right?

Mr. PIERCE. I would say so.

Commr. ALLDREDGE. Couldn't you work out a system to prorate that expense among all them and build that connection?

Mr. PIERCE. Well, I think it would be up to the industries to do that among themselves. Apparently the rest of them are satisfied to use this service, that is, all except Swift.

Commr. ALLDREDGE. I understand your position, but you have got tied up to a contract that limits your functions as a common carrier. Wouldn't that suggestion that the
911 New York Central might take the initiative in that situation, help this matter?

Mr. PIERCE. We cannot see the justification for it. We cannot see where we are tied up in any contract, Mr. Commissioner.

Commr. ALLDREDGE. You would rather continue to take the risk of having complaints against you about discrimination and perhaps the development of further industries down there when you are not fully free to keep the service going?

Mr. PIERCE. We would only give limited service any place where you have to cross a highway or have any other physical condition.

Swift and Company has been threatened all along with reference to service being granted to its plant over here, across West Sixty-fifth Street. The City Council of Cleveland gives you 30 days' permit. They can cancel the permit to cross that grade on 30 days' notice. They have always been threatened with suspension of service over there [indicating] or an interruption of it.

The only way they could do it is if they would be willing to go ahead with their 1908 arrangement, so that they would not be threatened, up at the north end of West Sixty-third Street.

Commr. PATTERSON. Wouldn't they be threatened there, too? Don't they have to cross the street?

912 Mr. PIERCE. They do, but they cross the part not traversed by public vehicles very much.

Commr. PATTERSON. It has the same threat?

Mr. PIERCE. They might even get that street vacated, Mr. Commissioner, as the other property owner is doing now, as I understand it. If they got it vacated, they would be set all right.

Now, in these contracts too, Mr. Commissioner, with Swift and Company, it says, "The railroad shall have the right to cease, forthwith and without notice, all operations upon said track, if compelled so to do by the owners, other than the respective parties hereto, of any portion of said track, or of the land upon which said track, or any portion thereof, may be laid."

Swift and Company has known about that all the time.

Exhibit 61 is a letter in 1919 from Mr. H. L. Gallen, of Swift and Company, addressed to E. M. Castin, Federal manager of the Big Four at that time. In discussing the track arrangement then, they said they wanted some changes made. Here is Swift and Company's comment:

"We write this without any thought of criticism on the part of the carriers, as the switching lay-out was originally forced upon the carriers and the shippers served by the present tracks, and, therefore, neither the shippers nor the carriers are at fault.
913 but it is our position that wherever the situation can be improved, appropriate action should be taken in the premises."

Now, the New York Central has introduced into the record all of its known and available records. Swift and Company just comes in on a theory, that is all they are in here on. They are not talking to you about any evidence that they put into the picture at all.

When the complaint was in here before, there was not any information, that is, hardly any, for the Commission to look at. At the suggestion of several Commissioners it was ordered set for rehearing.

Commr. ALLDREDGE. Isn't that development taking place down there on a somewhat precarious foundation insofar as transportation is concerned?

Mr. PIERCE. Well, we did pretty much as the Stock Yards and Swift and Company wanted us to do there; yes. They were in bed together from 1916 to 1936, and whatever they wanted over at the stockyards, we did pretty much what they wanted over there.

Commr. ALLDREDGE. But other industries are tacking onto those tracks, and all of them are tied up with that provision. A private industry can stop the whole thing on 30 days' notice and you cannot handle any business to them from any of those industries. It is a situation where one is in a very strategic spot.

914 Mr. PIERCE. I should like to call attention to this, that there doesn't seem to be any tendency on the part of the

Stock Yards to restrict the use of that track to anything except livestock, and there is no complaint from anyone except Swift and Company, and Swift and Company accepted the construction of this restricted use of this track in 1938, when the railroad company notified Swift that the Stock Yards said we could not move any shipments that were competitive over that. We notified them that we would like to have them consent to a change in the sidetrack agreement so that we would be in a position where they would not expect certain deliveries. Swift and Company came back and said, "We are not going to quarrel with you about it. We think in case of a strike or riot that you ought to agree to deliver the cars over to our plant."

The railroad said in reply to Swift, "We cannot very well do that unless the Stock Yards consent to it." That was in 1938. Nothing was done by Swift and Company, although they recognized it then.

In 1941 Swift and Company wrote a formal letter so as to get this complaint before the Commission, and made demand that the stock be delivered to their plant. The railroad notified them, the exhibits are in here, 4 and 5, the railroad notified them that it was impossible, that there was this barrier, that the Stock
915 Yards Company owns the property, and that "You are in a better position to deal with the Stock Yards than the Railroad Company is." So that Swift and Company had its opportunity, and, I say, still has its opportunity, but it wants to impose this obligation upon the New York Central Railroad. It wants to impose the obligation of going over to the Stock Yards and saying, "Well, now, here Swift and Company wants to handle their business over your track, which is competitive with your interests, and you arrange for it."

They had asked us to arrange for it.

Swift and Company did not want to pay, in 1908, to get their connection in. Swift and Company does not want to pay in 1945, and that seems to be the thing that has brought us here.

Do I have any more time?

Chairman Rogers. Yes; you have a few more minutes.

Mr. Prince. I want to say we have recognized all along that the industry must bring its track to the trunk line.

We think that the Commission held that in I. C. C. No. 237, that is the Rex Jellico Coal Company case, 237 I. C. C. 67; and in the Certain-Teed Products case, where there was a claim made there similar to the claim made here. In that case the complainant contended that it was the duty of the Rock Island to furnish, as a facility used by it in transporting traffic to and from com-
916 plainant's plant under through rates, a spur track which extended for about 2,000 feet from the complainant's plant

and the plants of two other industries adjacent thereto, to the tracks of the Rock Island.

This track was built by the Rock Island for a certain plant, and under the construction contract the Rock Island agreed to pay $1 per car to the owners of the track if it should use the track for the purpose of transporting thereon the traffic of certain industries. The track, as I stated, was owned by another company. The Rock Island provided the motive power and they were assessing a $1 charge without a tariff.

The Commission said that there was no provision for the charge until the tariff was filed; as I recall, it said that was not a tenable complaint, you might say. The complaint was not justified, and they said further that the question that this was a Rock Island facility, which the Rock Island is compelled to provide, is also untenable, and they said further:

"There is no duty on the part of a common carrier subject to the Act to provide tracks off its lands to effect connection with an industry. If an industry desires connection with a trunk line, the duty devolves upon it to make arrangements for the procuring of a spur. Paragraph 9 of section 1 makes it the duty of a common carrier under stated circumstances to construct, maintain,
917 and operate upon reasonable terms, switch conections with private sidetracks which may be constructed to connect with its rails by shippers tendering interstate commerce. But this duty does not arise until the shipper has provided the sidetrack."

I think that is the point you had in mind, Mr. Commissioner.

It seems to me there has been nothing shown here which would justify the position that the Stock Yards has dedicated anything in connection with this track.

Chairman Rogers. The issue might be presented whether you should be compelled to build that 300 feet up there, even though it is off your right-of-way at the present time. I think the Supreme Court held in two or three cases that we did have the authority to do that in a proper case and with proper evidence.

I realize that may not be presented here.

Mr. Pierce. Well, in a dedication in Ohio, there are three conditions under which that can be done; that is, by donation, by purchase, or by appropriation. Frankly, we feel there has been none of those methods used here.

If the Commission should conclude that, notwithstanding the absolute and indisputable knowledge of Swift at all times of the preservation by the Stock Yards of the ownership and control
of Stock Yards track, 1,619 feet, and the limited use of that
918 track granted to the New York Central, and the principles of law applicable to the facts in this case, that the obliga-

tion rests upon the railroad to compel the Stock Yards to extend the full use of Stock Yards track, 1,619 feet, for the convenience and benefit of Swift, I am of opinion, from my meager knowledge of the law, that the railroad would be forced into expensive litigation, which in the end would not be successful.

It seems to me the Stock Yards Company could eject the railroad from that property at any time. They could suspend service over that track. They could remove the track and they could proceed under ejectment proceedings under the Ohio law.

Commissioner PATTERSON. In ejecting they would eject you from serving the Stock Yards Company too, wouldn't they? In other words, don't you serve the Stock Yards on that track, too?

Mr. PIERCE. Well, that track—there is a track here which connects with the 1,619 feet that goes over to the south and west. Now, that serves the loading pens, the hogloading pens, of the Stock Yards. But if they did not want that in there, they could handle the hog loading over here [indicating] on these tracks which are on their property. They would not be handled by that [indicating].

I do want to say this in closing. The New York Central is still willing to make such deliveries over Swift and
919 Company's plant as the Stock Yards will permit be made over that track, and also to call attention to the fact that if service is required to be reestablished over Swift and Company's plant, they still have only one door over here [indicating], so you would have to spot one car at a time, and where the Railroad Company would be required to keep a locomotive there with a crew and spot every car at the convenience of the shipper.

Now, in the second hearing Swift and Company attempted to broaden its complaint by saying, if it could get this service restored, it would then get some vacant property in there [indicating] and it would put in some portable chutes so that they could handle six cars and maybe eight cars at a time. The facilities are still for one car at a time through one door at the Swift plant.

Chairman ROGERS. Mr. Rynder, you have a few minutes.

Rebuttal argument of R. D. Rynder

Mr. RYNDER. I think you would hardly expect a practical person to do unnecessary things. I think Mr. Pierce's summary of the testimony is not quite right. We have ten pens at the present time. We can unload now six cars by merely putting a portable chute beside them, and that is done throughout the United States everywhere.

Now, my friend Mr. Farmer has said he might as well close his doors if this would happen. Well, I am not inviting
920 him to close his doors, but it must be very obvious that a practical man, in the operation of a business, does not submit to what he considers an injustice if there is a way of getting around it.

The Commission held—and a divided Supreme Court sustained them—that we were not entitled to egress without payment of extra charges at the Chicago Stock Yards. We have not shipped a car through the Chicago Stock Yards since that time, and that business has been lost largely to the railway as well as to the stockyards. All we had to do was provide an unloading place adjacent to the yards, and our own unloading pens there located, and move the stock a short distance by truck.

Now we have our own unloading pens here. During this war period it has not been possible to obtain truck transportation for the entire amount that we have. But we have an idea that probably in the reconversion period trucks would be one of the first things that would be on the road, and if we are subjected to what we consider an unlawful and improper fee for getting livestock that we have bought in the country or, let us say, at Indianapolis or Chicago, to a plant sidetrack here [indicating], we are certainly not going to ship it by rail. That will mean that the Stock Yards will lose its fee, because there is no law requiring a truck to go into a stockyard and unload, nor a railroad for that
921 matter. That will mean that the New York Central would lose the business, and, of course, the Stock Yards would not get its fee for unloading. If that would cause it to close up its business, it is strange that it has not a word to say against the direct deliveries of livestock to the three plants immediately to the north.

Now, you will notice in this correspondence they have talked about, that the Stock Yards said with respect to the railroad—and I think the railroad is the only person whom I have a remedy against here—that they would not let them use this track without proper compensation. There has never been any suggestion to us by the New York Central as to what compensation they ought to have, if any.

Chairman Rogers. Is this thing worth the $24,000 that it would take to build that track up there?

Mr. Ryder. The $24,000 was not to build a track. That was prior to 1910, and it was the price on some private land up here that had to be condemned, a price set in the condemnation proceedings against some private land there. It has nothing to do with the cost of using or maintaining the track.

Commr. Porter. I am wondering, under the Oregon decision of the Supreme Court where they held we could not make a railroad build 180 miles but we could make them build to property they already had undertaken to serve, might you not under that decision compel the New York Central to build that end
922 up there and connect you up?

Mr. Ryndon. I have not thought much about that. But the point I am making is that here is our track connection [indicating]. It is already installed. The green line is the private sidetrack, but the red line with which we are connected is not the Stock Yards' but the New York Central's line used in its general terminal business.

The courts as well as the Commission have held that the delivery, the terminal tracks of a railroad are as much a part of the main line—and certainly the use of a track from 1910 until the present day, mind you, the present day, for everything except livestock, that track has been so used—I contend you do not have to have a formal dedication nor a condemnation; that if a man devotes his property to that public use for a sufficient period of time, the courts have said that he has not had it condemned, not dedicated by a formal action, but he has devoted it to the public use, from which it cannot be withdrawn to the detriment of the public served by it. If I am correct in that contention, I think the Examiner should be reversed.

Finally, if I am incorrect in that connection, of course the Examiner should be sustained.

Commr. Barnard. Do you think that the contention that the statute would permit these people to abandon that operation any time they wanted to, is a correct statement?

923 Mr. Ryndon. It is provided by the statute that they can simply abandon it. If a railroad were to try to abandon a track we thought it had to maintain, our action would be before the proper State authorities, but we have not yet been faced with abandonment of the track in this case.

Commr. Barnard. I do not think that makes much difference. When you make the argument it is a dedication, you have to look at the statute that gives them a perfect right, any time they see fit, to abandon the operation. The two things go together.

Mr. Ryndon. I have been under the impression that you and I have been rather viewing this case from different standpoints.

Commr. Barnard. We seem to be.

Chairman Rogers. The case is submitted and will be taken under advisement.

(Whereupon, at 12:30 p. m., the case was submitted and the Commission adjourned.)

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931 New York, Ontario and Western Railway Company (Raymond L. Gibbardt and Ferdinand J. Sieghardt, Trustees)	81				46	40																	
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Norwood & St. Lawrence Railroad Company	67				26																		
Ohio & Morenci Railroad Company, The							1																
Ohio Public Service Company, The	29																						
Owasco River Railway, The							9				9												
Patapsco & Back Rivers Railroad Company	FX1 No. 1			18																			
Pennsylvania and Atlantic Railroad Company (South of Hightstown, N. J., to Pemberton, N. J., Inc.) (The Union Transportation Company, Lessee)	26																						
Pennsylvania Railroad Company, The	75			15	20	16																	

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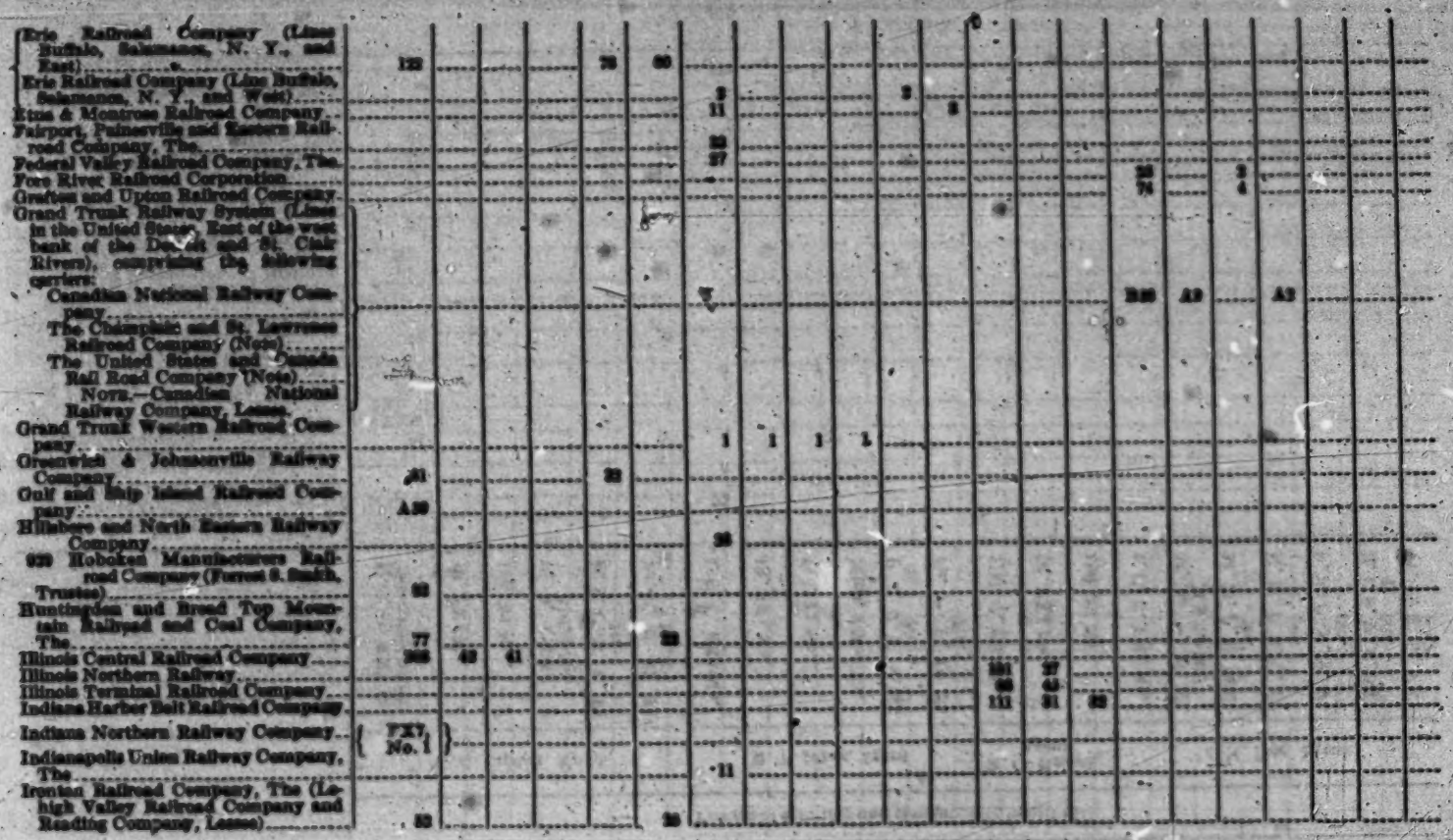
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Akron & Barberton Belt Railroad Company, The	FX7, No. 1																							
Akron, Canton & Youngstown Railroad Company, The							109																	
Aliquippa and Southern Railroad Company	FX6, No. 1																							
Alton and Southern Railroad	FX7, No. 12					6																		
Alton Railroad Company, The (Henry A. Gardner, Trustee)							39	23																
Ann Arbor Railroad Company, The							116			42														
Arcade and Attica Railroad Corporation	75				36																			
Aroostook Valley Railroad Company																27	10							
Baltimore and Annapolis Railroad Company, The	FX7, No. 6			3																				
Baltimore and Eastern Railroad Company	35			13																				
Baltimore and Ohio Railroad Company, The	189			30	34	35													46					
Baltimore and Ohio Chicago Terminal Railroad Company, The													77	27	26									
Barre and Chelsea Railroad Company																23								1
Bellist & Moosehead Lake Railroad Company																29	13							
Belt Railway Company of Chicago, The																								
Bessemer and Lake Erie Railroad Company							79						66	20										

Boston and Maine Railroad, a

Boston and Maine Railroad																								
Boyne City Railroad Company																								
Buffalo Creek Railroad Company (Erie Railroad Company and Lehigh Valley Railroad Company, Lessees)	FX7, No. 1				1																			
927 Canadian National Railways (Lines West Fort William, Ont., Armstrong, Ont., and East thereof)								E80																
Canadian Pacific Railway Company [1] (Lines West Fort William, Fort William, Ont., and East thereof)																		K15						
Canton Railroad Company	FX7, No. 11			13																				
Castleman River Railroad Company, The	FX7, No. 1																							
Central Indiana Railway Company								67		22														
Central Railroad Company of New Jersey, The (Stockton Pitney and Walter P. Gardner, Trustees)	28					28																		
Central Vermont Railway, Inc																		21			7			
Chestnut Ridge Railway Company	77					24																		
Chicago and Calumet River Railroad Company	FX7, No. 24																							
Chicago & Illinois Western Railroad	79	66A																						
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Chicago, Aurora and Elgin Railroad Company (Arthur L. Schwartz, Trustee)								80	72															
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Chicago River and Indiana Railroad Company, The								11	11															
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Chicago, South Shore and South Bend Railroad								28	26	26														
Chicago, West Pullman & Southern Railroad Company															22	20								
Conemaugh & Black Lick Railroad Company	FX8, No. 1					12																		
Cornwall Railroad Company	91					40																		

[1] Will only apply at points on Canadian Pacific Ry. in the States of Maine and Vermont.

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						B. T. Jones, Agent						R. G. Rausch, Agent			I. N. Doe, Agent								
	I. C. C. FX1 No. (except as noted)	Ill. FX1 No.	Ind. F1 No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. F1 No.	Pa.-P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	Mich. FM-1 No.	P. S. C.-N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. F1 No.	P. S. C.-N. Y. F1 No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Cumberland and Pennsylvania Railroad Company	63			31																				
Curtis Bay Railroad Company	FX3, No. 1			1																				
Cuyahoga Valley Railway Company, The							20																	
928 Delaware and Hudson Railroad Corporation, The	20				19	17																		
Delaware, Lackawanna and Western Railroad Company, The	77				46	40																		
Delray Connecting Railroad Company	FX7, No. 1																							
Detroit and Mackinac Railway Company							63			18														
Detroit and Toledo Shore Line Railroad Company, The							26			20														
Detroit and Western Railroad Co							5			1														
Detroit Terminal Railroad Company	FX7, No. 1																							
Detroit, Toledo and Ironton Railroad Company							28			14		3												
Donora Southern Railroad Company							5																	
East Broad Top Railroad and Coal Company	29					24																		
East Jersey Railroad and Terminal Company	111																							
East Washington Railway Company	15			7																				
Elgin, Joliet and Eastern Railway Company													119	39	37									


Erie Railroad Company (Lines Buffalo, Salamanca, N. Y., and East)
Erie Railroad Company (Lines Buffalo, Salamanca, N. Y., and West)
Etna & Montrose Railroad Company
Fairport, Painesville and Eastern Railroad Company, The
Federal Valley Railroad Company, The
Fore River Railroad Corporation
Grafton and Upton Railroad Company
Grand Trunk Railway System (Lines in the United States, East of the west bank of the Detroit and St. Clair Rivers), comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company (Note)
The United States and Canada Rail Road Company (Note)
NOTE.—Canadian National Railway Company, Lessee.
Grand Trunk Western Railroad Company
Greenwich & Johnsonville Railway Company
Gulf and Ship Island Railroad Company
Hillsboro and North Eastern Railway Company
920 Hoboken Manufacturers Railroad Company (Forrest S. Smith, Trustee)
Huntingdon and Broad Top Mountain Railroad and Coal Company, The
Illinois Central Railroad Company
Illinois Northern Railway
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
Indiana Northern Railway Company
Indianapolis Union Railway Company, The
Ironton Railroad Company, The (Lehigh Valley Railroad Company and Reading Company, Lessee)
FXY, No. 1

Name of carrier	Powers of attorney and concurrences issued to—																									
	W. S. Corlett, Agent						B. T. Jones, Agent						R. C. Reamer, Agent			I. N. Dow, Agent									
	I. C. C. FX1 No. (except as noted)	Ill. FX1 No.	Ind. F1 No.	F. R. C.-Md. F Md. 1 No.	P. R. C.-N. Y. F1 No.	Pa.-P. R. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	Mich. F1d-1 No.	P. R. C.-N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	I. C. C. FX1 No.	Maine P. U. C. MX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. F1 No.	P. R. C.-N. Y. F1 No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.				
Jamestown, Westfield and Northwestern Railroad Company							25																			
Johnstown and Stony Creek Rail Road Company							5						8													
Lackawanna and Wyoming Valley Railroad Company	26					26																				
Lake Erie and Eastern Railroad Company, The	FX1, No. 3																									
Lake Erie and Fort Wayne Railroad Co.							6		4																	
Lake Erie, Franklin & Clarion Railroad Company	64					28																				
Lakeside and Marblehead Railroad Company, The							21																			
Lake Terminal Railroad Co., The							7																			
La Salle and Bureau County Railroad Company, The							28	10																		
Lehigh and Hudson River Railway Company, The	74					42																				
Lehigh and New England Railroad Company	2828					2828	12																			
Lehigh Valley Railroad Company							12																			
Ligonier Valley Railroad Company						28																				
Long Island Rail Road Company, The																										
Lorain & West Virginia Railway Company, The							50																			
Louisville & Jeffersonville Bridge and Railroad Company							11	2	1							C67	14		9							
Maine Central Railroad Company																										

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Pennsylvania-Reading Seashore Lines	26																											
Peoria and Pekin Union Railway Company									35	14																		
Pere Marquette Railway Company									101		24	20																
Philadelphia, Bethlehem and New England Railroad Company	FX3, No. 1						23																					
Pittsburgh, Allegheny & McKees Rocks Railroad Company									9					10														
Pittsburg & Shawmut Railroad Company, The	87						30																					
Pittsburgh and Lake Erie Railroad Company, The	99						36																					
Pittsburgh and Ohio Valley Railway Company	FX7, No. 2						6																					
Pittsburgh & West Virginia Railway Company, The	61						31																					
Pittsburgh, Chartiers & Youghiogheny Railway Company	97						40																					
Pittsburg, Shawmut & Northern Railroad Company, The (John D. Dickson, Receiver)	106				63		24																					
Portland Terminal Company																					28	14						
Pullman Railroad Company	FX7, No. 6																											
Rahway Valley Company (Rahway Valley Company, Lessee)	29																											
Raritan River Rail Road Company	96																											
Reading Company	42						26																					
982 River Terminal Railway Company, The	14																											
Roslyn Connecting Railroad Company	18																											
Rutland Railroad Company (William E. Navin and Wallace M. Fay, Trustees)																					A1				A2		A3	
St. Johnsbury & Lake Champlain Railroad Company, The (John E. Willis, Trustee)																					1						1	
St. Louis & Belleville Electric Railway Company																												
St. Louis and Ohio River Railroad	43																		28	14								
South Buffalo Railway Company	FX3, No. 3				17																							
Springfield Suburban Railroad Company, The	FX7, No. 1																											
Springfield Terminal Railway Company																					19						2	
Staten Island Rapid Transit Railway Company, The	61				28																							

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						R. T. Jones, Agent						R. O. Rausch, Agent			I. N. Doe, Agent							
	I. C. C. FX1 No. (except as noted)	Ill. FX1 No.	Ind. FI No.	P. S. C.-Md. F Md. 1 No.	P. S. C.-N. Y. FI No.	Pa.-P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	Mich. FM-1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. FI No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. P. U. MX1 No.	N. H. P. S. C. FI No.	P. S. C.-N. Y. FI No.	R. I. P. U. A. FX1 No.	Vt.-P. S. C. VX1 No.	
Steelton & Highspire Railroad Company	FX8, No. 1					20																	
Suncook Valley Railroad																							
Toledo, Angola & Western Railway, The	FX7, No. 1															16			2				
Toledo, Peoria & Western Railroad (Holly Stover, Federal Manager)																							
Toledo Terminal Railroad Company, The							52	26															
Toronto, Hamilton and Buffalo Railway Company, The							40	FX8, No. 42															
Trenton-Princeton Traction Company																							
Union Freight Railroad Company (Boston, Mass.)	22																						
Union Railroad Company																							
Unity Railways Company							40					9				20		9					
Upper Merion and Plymouth Railroad Company	24 FX7, No. 1					1																	
Wabash Railroad Company																							
Washington and Old Dominion Railroad	82						265	82	47	38	39												
Waynesburg & Washington Railroad																							
Western Maryland Railway Company	99						22					13											
Wharton and Northern Railroad Company	45			26		70																	
Wheeling and Lake Erie Railway Company, The							40																

| | | |

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-622	134-A	Ill. C. C. A-2, Ind. R. C. A-2, P. S. C.-Md. A-32, P. U. C.-N. J. A-29, P. S. C.-N. Y. A-166, Pa. P. U. C. A-122, Vt. P. S. C. A-28, Va. C. C. A-62, P. S. C.-W. Va. A-42, Conn. P. U. C. 12, Maine P. U. C. 47, M. D. P. U. 32, N. H. P. S. C. 40, P. S. C.-N. Y. 61, R. I. P. U. A. 36, Vt. P. S. C. 41.
I. N. Doe	623	53-A	
B. T. Jones	4002	622	Ill. C. C. 342, Ind. R. C. D-720, K. R. C. 96, Mich. P. S. C. 624, P. S. C.-N. Y. 272, Ohio 2130, Pa. P. U. C. 338, P. S. C.-W. Va. 391.
R. G. Raasch	620	.....	Ill. C. C. 309, Ind. R. C. 134, P. S. C. Mo. 69.

W. S. Curlett, I. N. Doe, B. T. Jones, and R. G. Raasch, Agents

Local Freight Tariff of Rules Governing Receipt and Delivery of Cars of Freight (Except Coal at Mines, Breakers, and Washeries; Iron Ore at Mines; Beehive Coke at Ovens; and Traffic at the Dock Where Such Traffic is Interchanged With Water Carriers) on, to and/or From Private Tracks and Industrial Tracks Served by Carriers Shown on Pages 2 to 9 of Tariff

Issued October 22, 1945. Effective November 1, 1945 (except as noted).

Authority to publish on one (1) day's notice granted by permission of the Interstate Commerce Commission No. 26705 of October 19, 1945, and under authority of:

Connecticut Public Utilities Commission, Authority SN-632 of October 22, 1945.

Illinois Commerce Commission Special Permission No. R-13044 of October 23, 1945.

Public Service Commission of Indiana, Special Permission No. TB-4724 of October 22, 1945.

Kentucky Railroad Commission, Short Notice No. 727 of October 22, 1945.

Maine Public Utilities Commission Special Permission R. R. No. 2822 of October 22, 1945.

Public Service Commission of Maryland, Order No. 41489 of October 18, 1945.

Massachusetts Department of Public Utilities Special Permission No. 7008-TM of October 22, 1945.

Michigan Public Service Commission, Special Permission No. 1550, amended of October 22, 1945.

Public Service Commission of Missouri, Authority No. 8373 of October 24, 1945.

New Hampshire Public Service Commission Order No. 4774 of October 24, 1945.

Board of Public Utility Commissioners, State of New Jersey, Permission dated October 18, 1945.

Public Service Commission, State of New York, Special Permission Order No. 14755 of October 22, 1945.

The Public Utilities Commission of Ohio, Special Permission No. 9934 of October 19, 1945, amended.

Effective upon less than statutory notice by Special Permission of the Pennsylvania Public Utility Commission No. 21688 of October 23, 1945.

Rhode Island Public Utilities Administrator Order No. 5634 of October 22, 1945.

Vermont Public Service Commission Special Order No. 404 of October 23, 1945.

Public Service Commission of West Virginia, Informal Order No. 3768 of October 22, 1945.

B. T. Jones, Agent, 608 South Dearborn Street, Chicago 5, Ill.

R. G. Raasch, Agent, 236 Union Station Building, 516 W. Jackson Blvd., Chicago 6, Ill.

I. N. Doe, Agent, Room 524, South Station, Boston 10, Mass.

Issued by W. S. Curlett, Agent, 143 Liberty Street, New York 6, N. Y.

935–A POSTPONEMENT NOTICE

The Effective DATE of Tariffs to which this is a Supplement is hereby postponed from November 1, 1945, until January 1, 1946.

Effective January 1, 1946. Cancel the following from Page 2 of Tariff:

CANCELLATIONS

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-620	154	Ill. C. C. A-1, Ind. R. C. A-1, P. S. C.-Md. A-62, P. U. C.-N. J. A-26, P. S. C.-N. Y. A-144, Pa. P. U. C. A-120, Vt. P. S. C. A-22, Va. C. C. A-66, P. S. C.-W. Va. A-61.
I. N. Doe	321	32	Conn. P. U. C. 12, Maine P. U. C. 66, M. D. P. U. 32, N. H. P. S. C. 30, P. S. C.-N. Y. 60, R. I. P. U. A. 25, Vt. P. S. C. 42.
B. T. Jones	2937		Ill. C. C. 941, Ind. R. C. D-782, K. R. C. 92, Mich. P. S. C. 883, P. S. C.-N. Y. 271, Ohio 2149, Pa. P. U. C. 317, P. S. C.-W. Va. 360.
R. G. Raasch	894		Ill. C. C. 287, Ind. R. C. 183, P. S. C. Mo. 68.

936 SUPPLEMENT No. 2

Supplements Nos. †1, ¢A, ¢B, §C and 2 contain all changes from the original tariff.

†Postponement Supplement.

¢Virginia Intrastate Supplement.

¢Illinois Intrastate Supplement.

§Connecticut Intrastate Supplement.

To

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-633	134-A	Ill. C. C. A-2, Ind. R. C. A-2, P. S. C.-Md. A-38, P. U. C. N. J. A-38, P. S. C.-N. Y. A-142, Pa. P. U. C. A-122, Va. P. S. C. A-38, Va. C. C. A-66, P. S. C.-W. Va. A-66, Conn. P. U. C. 12, Maine P. U. C. 47, Mass. D. P. U. 2, N. H. P. S. C. 66, P. S. C.-N. Y. 41, R. I. P. U. A. 38, Vt. P. S. C. 41.
I. N. Doe	522	33-A	
B. T. Jones	4003	622	Ill. C. C. 563, Ind. R. C. D-779, K. R. C. 38, Mich. P. S. C. 664, P. S. C.-N. Y. 373, Ohio 2159, Pa. P. U. C. 33, P. S. C.-W. Va. 293.
R. G. Raasch	600	----------	Ill. C. C. 800, Ind. R. C. 154, P. S. C. Mo. 68.

W. S. Curlett, I. N. Doe, B. T. Jones, and R. G. Raasch, Agents

Local Freight Tariff of Rules Governing Receipt and Delivery of Cars of Freight (Except Coal at Mines, Breakers and Washeries, Iron Ore at Mines, Beehive Coke at Ovens, and Traffic at the Dock Where Such Traffic is Interchanged with Water Carriers) on, to and/or from Private Tracks and Industrial Tracks served by carriers shown on pages 2 to 9 of Tariff and as amended.

Issued January 4, 1946. Effective February 15, 1946.

B. T. Jones, Agent, 608 So. Dearborn St., Chicago 5, Ill.

R. G. Raasch, Agent, 236 Union Station Building, 516 W. Jackson Blvd., Chicago 6, Ill.

Issued by W. S. Curlett, Agent, 143 Liberty St., New York 6, N. Y.

I. N. Doe, Agent, Room 524, South Station, Boston 10, Mass.

926-A

LIST OF CARRIERS

Name of carrier	Powers of attorney and concurrences issued to—																						
	W. S. Curlett, Agent						D. T. Jones, Agent						R. G. Rausch, Agent			L. N. Doe, Agent							
	I. C. C. FX1 No. (Except as Noted)	Ill. FX1 No.	Ind. F1 No.	P. & C.—Md. F. Md. 1 No.	P. & C.—N. Y. F1 No.	Pa.—P. U. C. F1 No.	I. C. C. FX1 No.	Ill. F1 No.	Ind. F1 No.	Mich. FM-1 No.	P. & C.—N. Y. F1 No.	Pa. P. U. C. F1 No.	I. C. C. FX1 No.	Ill. FX1 No.	Ind. F1 No.	I. C. C. FX1 No.	Maine P. U. C. MEX1 No.	M. D. F. MX1 No.	N. H. P. S. C. F1 No.	P. S. C.—N. Y. F1 No.	R. I. P. U. A. FX1 No.	Vt. P. S. C. VX1 No.
Carried from page 3 of Tariff: Chicago North Shore and Milwaukee Railroad Company (John E. Gallagher and Edward J. Quinn, trustees)																							
Add to page 4 of Tariff: Fort Wayne Union Railway Company							6																
Carried from page 4 of Tariff: Mississippi Central Railroad Company																							
Change on page 5 of Tariff: Upper Marion and Pigeonsh Railroad Company	FX7 No. 1					16																	

937

SUPPLEMENT No. 3

(Cancels Supplement No. 2)

Supplements Nos. †1, ♁ A, ⚓ B, §C and 3 contain all changes from the original tariff.

† Postponement Supplements.
♁ Virginia Intrastate Supplement.
⚓ Illinois Intrastate Supplement.
§ Connecticut Intrastate Supplement.

To

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-622	134-A	Ill. C. C. A-2, Ind. R. C. A-2, P. S. C.-Md. A-52, P. U. C.-N. J. A-28, P. S. C.-N. Y. A-146, Pa. P. U. C. A-138, Vt. P. S. C. A-36, Va. C. C. A-84, P. S. C.-W. Va. A-93
I. N. Doe	832	83-A	Conn. P. U. C. 13, Maine P. U. C. 47, M. D. P. U. 2, N. H. P. S. C. 40, P. S. C.-N. Y. 61, R. I. P. U. A. 35, Vt. P. S. C. 41
B. T. Jones	4002	622	Ill. C. C. 542, Ind. R. C. D-730, K. R. C. 93, Mich. P. S. C. 694, P. S. C.-N. Y. 272, Ohio 2150,-Pa. P. U. C. 318, P. S. C.-W. Va. 291.
R. G. Raasch	600	.....	Ill. C. C. 300, Ind. R. C. 134, P. S. C. Mo. 60.

W. S. Curlett, I. N. Doe, B. T. Jones, and R. G. Raasch, Agents

Local Freight Tariff of Rules Governing Receipt and Delivery of Cars of Freight (Except Coal at Mines, Breakers and Washeries, Iron Ore at Mines, Beehive Coke at Ovens, and Traffic at the Dock Where Such Traffic is Interchanged With Water Carriers) on to and/or From Private Tracks and Industrial Tracks Served by Carriers Shown on Pages 2 to 9 of Tariff and as Amended

Issued April 25, 1946. Effective May 29, 1946 (except as otherwise provided herein).

B. T. Jones, Agent, 608 So. Dearborn St., Chicago 5, Ill.

R. G. Raasch, Agent, 236 Union Station Building, 516 W. Jackson Blvd., Chicago 6, Ill.

Issued by W. S. Curlett, Agent, 143 Liberty St., New York 6, N. Y.

I. N. Doe, Agent, Room 524, South Station, Boston 10, Mass.

Name of carrier	Powers of attorney and concurrences issued to—																							
	W. S. Curlett, Agent						B. T. Jones, Agent						R. O. Baasch, Agent			I. N. Doe, Agent								
	I. C. C. FXI No. (except as noted)	Ill. FXI No.	Ind. FI No.	P. S. C.-Md. F. Md. 1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FXI No.	Ill. FI No.	Ind. FI No.	Mich. FM-1 No.	P. S. C.-N. Y. FI No.	Pa. P. U. C. FI No.	I. C. C. FXI No.	Ill. FXI No.	Ind. FI No.	I. C. C. FXI No.	Maine P. U. C. MEXI No.	M. D. P. U. MXI No.	N. H. P. S. C. FI No.	P. S. C.-N. Y. FI No.	R. I. P. U. A. FXI No.	Vt. P. S. C. VXI No.		
Cancel from page 2 of Tariff:																								
Alton and Southern Railroad																								
Cancel from page 3 of Tariff:																								
Canadian National Railways (Lines West Port William, Ont., Armstrong, Ont., and East thereof)																								
[1] Chicago North Shore and Milwaukee Railroad Company (John B. Gallagher and Edward J. Quinn, Trustees)																								
Add to page 4 of Tariff:																								
Flint Belt Railway							3																	
[1] Fort Wayne Union Railway Company							6																	
Cancel from page 6 of Tariff:																								
[1] Mississippi Central Railroad Company																								
Cancel from page 8 of Tariff:																								
St. Louis and Ohio River Railroad																								
Change on page 8 of Tariff:																								
[1] Upper Merion and Plymouth Railroad Company	FXI No. 1						16																	

[1] Released from Supplement No. 2, effective February 15, 1940.

939 SUPPLEMENT No. 4

Supplements Nos. †1, ♯A, ♯ B, § C, § D, 3 and 4 contain all changes from the original tariff.

† Postponement Supplement.

♯ Virginia Intrastate Supplement.

♯ Illinois Intrastate Supplement.

§ Connecticut Intrastate Supplement.

To

Issuing agents	I. C. C. No.	Tariff No.	State Commission numbers
W. S. Curlett	A-622	134-A	Ill. C. C. A-2, Ind. R. C. A-2, P. S. C. Md. A-66, P. U. C. N. J. A-66, P. S. C.-N. Y. 2-166, Pa. P. U. C. A-66, Vt. P. S. C. A-66, Va. C. C. A-66, P. S. C. W. Va. A-66.
I. N. Dee	622	134-A	Conn. P. U. C. 12, Maine P. U. C. 67, Mass. D. P. U. 12, N. H. P. S. C. 66, P. S. C.-N. Y. 66, R. I. P. U. A. 66, Vt. P. S. C. 66.
B. T. Jones	4002	622	Ill. C. C. 342, Ind. R. C. D-726, K. R. C. 66, Mich. P. S. C. 604, P. S. C.-N. Y. 272, Ohio 2180, Pa. P. U. C. 313, P. S. C. W. Va. 201.
R. G. Resch	600		Ill. C. C. 300, Ind. R. C. 134, P. S. C. Md. 66.

SPECIAL SUPPLEMENT INCREASE IN RATES AND CHARGES

Effective July 1, 1948, rates and charges in tariff and in prior supplements thereto are hereby increased as provided in Tariff of Increased Rates and Charges No. X-148:

Issuing agents	I. C. C. No.	State Commission numbers
W. S. Curlett	A-762	P. S. C. Md. A-44, P. U. C.-N. J. A-66, P. S. C.-N. Y. A-122, Pa. P. U. C. A-186, Vt. P. [illegible] A-19, V. C. C. A-66, P. S. C. W. Va. A-73.
I. N. Dee	484	Conn. P. U. C. 2, Maine P. U. C. 26, Mass. D. P. U. 44, New Hampshire P. S. C. 32, P. S. C.-N. Y. 41, R. I. P. U. A. 26, Vt. P. S. C. 32.
B. T. Jones	3020	Ill. C. C. 474, Ind. R. C. D-802, K. R. C. 66, Mich. P. S. C. 662, P. S. C.-N. Y. 226, Ohio P. U. C. 2015, Pa. P. U. C. 266, P. S. C. W. Va. 267.
R. G. Resch	500	Ill. C. C. 266, Ind. R. C. 126, P. S. C. Md. 61.

Supplements to or successive issues thereof.

The provisions of this supplement will NOT apply on intrastate traffic between points in, and transported wholly within, any one of the following-named States: Connecticut, Illinois, Indiana, Kentucky, Michigan, Missouri, New York, Ohio, Rhode Island, Vermont, Virginia, West Virginia, until authorized by lettered supplement to Tariff of Increased Rates and Charges referred to above and then only to the extent authorized by such lettered supplement.

If a prior supplement hereto contains rates or charges to become effective upon a date subsequent to the effective date of this supple-

ment such rates and charges will on their effective date, be increased as provided in "Tariff of Increased Rates and Charges" referred to above.

The form of this special supplement is permitted by authority of Interstate Commerce Commission, Permission No. 7620 of March 2, 1942 (as amended).

Issued June 27, 1946. Effective July 1, 1946.

Issued on three days' notice under authority of Order dated June 20, 1946, of the Interstate Commerce Commission, in Ex Parte No. 162 and Ex Parte No. 148.

Issued under authority of:

Maine Public Utility Commission Order No. R. R. 2848 dated June 25, 1946.

Public Service Commission of Maryland, Order No. 42335 of June 25, 1946.

Massachusetts Department of Public Utilities Order No. 7475 dated June 25, 1946.

New Hampshire Public Service Commission Order No. 4931 dated June 25, 1946.

Board of Public Utility Commissioners, State of New Jersey, Permission dated June 25, 1946.

Pennsylvania Public Utility Commission Special Permission No. 21891 dated June 24, 1946.

This supplement is exempt from the terms of Rule 9 (e) of Tariff Circular No. 20 under permission of the Interstate Commerce Commission No. 7620 dated March 2, 1942, as amended.

B. T. Jones, Agent, 608 So. Dearborn St., Chicago 5, Ill.

R. G. Raasch, Agent, 236 Union Station Building, 516 W. Jackson Blvd., Chicago 6, Ill.

Issued by W. S. Curlett, Agent, 143 Liberty St., New York 6, N. Y.

I. N. Doe, Agent, Room 524, South Station, Boston 10, Mass.

940 Special Supplement No. 5 to T. L. T. B. No. ——— I. C. C. No. A833. Special Supplement to I. C. C. Nos., C. T. C. Nos., State Commission Nos. shown herein.

TRUNK LINE TARIFF BUREAU

W. S. Curlett, Agent

Special Supplement to Tariffs Listed Herein Issued by W. S. Curlett, I. N. Doe, R. H. Hoke, B. T. Jones, L. E. Kipp, W. M. Matthews, D. Q. Marsh, R. G. Raasch, Agents, and A. H. Carson, Alternate Agent

Applying in Connection With Participating Carriers Shown in Tariffs and Supplements Thereto Enumerated on Pages 2, 3, and 4 Herein

Rates, Routes, and Other Arrangements From, to, at, or via Central Railroad Company of Pennsylvania

PARTICIPATING CARRIERS

Abbreviation	Carrier	
Add—CRRofPa	Central Railroad Company of Pennsylvania	I. C. C. FX1 No. 4. C. T. C. P. A. No. 4. Pa. P. U. C. 71 No. 4.

ADOPTION NOTICE

The Carrier shown in Column No. 2 below, by its adoption notice shown in Column No. 3 below, having taken over tariffs, etc., of the Carrier shown in Column No. 1 below, insofar as they contain rates, charges, rules, or regulations applying from, to, at, or via the stations shown below, the Carrier shown in Column No. 2 below, is hereby substituted for the Carrier shown in Column No. 1 below, wherever it appears in this tariff, and as amended, in connection with said stations and rates:

Column No. 1 Old Carrier	Column No. 2 Adopting Carrier	Column No. 3 Adoption Notice
Central Railroad Company of New Jersey, The (Stations shown below.)	Central Railroad Company of Pennsylvania	I. C. C. No. A-1.

Station	Index No.	Station	Index No.	Station	Index No.	Station	Index No.
Alden, Pa.	342	Freemansburg, Pa.	378	Mountain Park, Pa.	325	Scranton, Pa.	491
Allentown, Pa.	388	Glen Onoko, Pa.	409	Nanticoke, Pa.	439	Seigfried, Pa.	488
Ashley, Pa.	538	Glen Summit, Pa.	320	Nesquehoning, Pa.	445	Solomon's Gap, Pa.	488
Auchmoody, Pa.	533	Glen Summit Water, Pa.	330	Nesquehoning Jct., Pa.	442	South Wilkes-Barre, Pa.	571
Audenried, Pa.	403	Hancks, Pa.	457	Northampton, Pa.	400	Sugar Notch, Pa.	457
Bergen, Pa.	514	Hanto, Pa.	448	Odenwelder, Pa.	304	Tannery, Pa.	457
Bethlehem, Pa.	379	Hanto Storage Yard, Pa.	446	Packerton Jct., Pa.	436	Taylor, Pa.	525
Bethlehem Jct., Pa.	382	Hauk St., Pa.	374	Palmerton, Pa.	418	Treichler, Pa.	406
Bowmanstown, Pa.	434	Hokendauqua, Pa.	397	Parryville, Pa.	427	Tusscknow, Pa.	481
Buttonwood, Pa.	544	Hometown, Pa.	451	Parsons, Pa.	550	Tunnel, Pa.	511
Catasauqua, Pa.	391	Laurel Run, Pa.	532	Penn Haven Jct., Pa.	472	Union Jct., Pa.	382
Coplay Branch Jct., Pa.	394	Lee, Pa.	509	Penobscot, Pa.	526	Upper Lehigh, Pa.	505
Drifton Jct., Pa.	481	Lemoine, Pa.	536	Plains Jct., Pa.	559	Upper Lehigh Jct., Pa.	480
East Allentown, Pa.	386	Lehigh Gap, Pa.	415	Pond Creek, Pa.	426	Walnutport, Pa.	413
Easton, Pa.	361	Lehighton, Pa.	432	Pond Creek Jct., Pa.	422	Wanamie, Pa.	550
Easton (Taylor St.), Pa.	370	Leslie Run, Pa.	478	Rita, Pa.	517	Warrior Run, Pa.	530
E & W Jct., Pa.	367	Lindner, Pa.	454	Rockport, Pa.	475	Weissport, Pa.	426
Enterprise Siding, Pa.	350	Lockport, Pa.	469	Sandy Run, Pa.	502	White Haven, Pa.	488
Fifth Avenue (Scranton) Pa.	500	Munch Chunk, Pa.	420	Sandy Run Jct., Pa.	499	Wilkes-Barre, Pa.	577
Franklin Jct., Pa.	541	Miners Mills, Pa.	505				

ROUTES

Wherever, in tariffs to which this is a supplement, routes are published to, from, or via the above-named points and the Central Railroad Company of New Jersey is shown as origin, intermediate or terminal carrier, the Central Railroad Company of Pennsylvania is hereby substituted for the Central Railroad Company of New Jersey as origin, intermediate or terminal carrier from, to, or via such points.

State Line Jct., N. J.-Pa., is the junction point between The Central Railroad Company of New Jersey and Central Railroad Company of Pennsylvania, on traffic moving from, to, or via such carriers.

Issued September 3, 1946. Effective September 6, 1946. (Except as noted.)

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Number of this supplement	I. C. C. No.	MF-I. C. C. No.	FF-I. G. C. No.	C. T. C. No.	Tariff No.	State commission numbers
11	A-818			A-357	1-B	
	(2)3054			(2)1030		
3	A-647			A-377	2-D	
	(2)4032			(2)1071		
11	A-634				3-E	P. S. C.-Md. A-32, P. S. C.-N. Y. A-96, Pa.-P. U. C. A.-94; V. C. C. A-44, P. S. C.-W. Va. A-6.
18	A-812	A-43		A-451	5-C	
34	A-803				6-B	
	(2)3186					Ohio 1784.
30	A-863				10-C	
7	A-827	A-56		A-384	11-D	
	(2)827	(2)69		(2)443		
130	A-831			A-411	14-D	V. C. C. A-45.
33		A-41			14-D	
61	A-823			A-391	23-N	P. S. C.-N. Y. A-141, Pa. P. U. C. A-118, P. S. C.-W. Va. A-79.
71	A-486			A-283	25-B	P. S. C.-N. Y. No. A-51.
96	A-809			A-389	29-E	
	(2)3186			(2)1084		
37		A-45			29-E	
		(2)105				
5	A-842				30-Q	
7	A-796			A-394	31-A	
	(2)836			(2)435		
81	A-799			A-396	37-F	
51	A-770			A-520	43-D	
115	A-647			A-425	43-E	
	A-820	A-51		A-[illegible]	44-I	
47	(2)827	(2)64		(2)[illegible]		
	(2)3175	(2)110		(2)[illegible]		
	(2)938	(2)114				
77	A-709			A-405	48-D	
89	A-814			A-399	49-A	
13		A-47			49-A	
48	A-680			A-437	51-B	
15		A-44			51-B	
62	A-808			A-454	52-A	P. S. C.-N. Y. A-110, Pa. P. U. C. A-94, P. S. C.-W. Va. A-66.
34	A-808				52-A	
11	A-792			A-389	55-C	

For explanation of reference marks, see page 570 herein.

Number of this supplement	I. C. C. No.	MF-I. C. C. No.	FF-I. C. C. No.	C. T. C. No.	Tariff No.	State commission numbers
44	A-796			A-611	90-A	K. R. C. A-12, Pa. P. U. C. A-112.
134	A-321			A-189	61	P. S. C.-N. Y. A-41, Vt. P. S. C. A-3.
144	A-333				62	P. U. C.-N. J. A-2, P. S. C.-N. Y. A-42.
143	A-333			A-189	63	P. S. C.-N. Y. A-43, Pa. P. U. C. A-40.
151	A-334				64	P. S. C.-Md. A-4, P. U. C.-N. J. A-3, Pa. P. U. C. A-41.
148	A-335			A-190	65	P. S. C.-Md. A-5, P. S. C.-N. Y. A-44, Pa. P. U. C. A-42.
148	A-336			A-191	66	P. S. C.-Md. A-7, Pa. P. U. C. A-43, P. S. C.-W. Va. A-39.
155	A-337				67	P. S. C.-Md. A-8, Pa. P. U. C. A-44, Va. C. C. A-13, P. S. C.-W. Va. A-40.
83	A-755			A-804	68-A	P. S. C.-N. Y. A-129, Ohio A-23, Pa. P. U. C. A-111, P. S. C.-W. Va. A-76.
166	A-339			A-193	69	P. S. C.-Md. A-11, Va. C. C. A-13, P. S. C.-W. Va. A-53.
158	A-340			A-194	70	K. R. C. A-2, Pa. P. U. C. A-46, Va. C. C. A-14, P. S. C.-W. Va. A-38.
85	A-744	A-35		A-497	71-A	Ohio A-22, P. S. C.-N. Y. A-122, V. P. S. C. A-20.
20	①489	①54		①2891		P. S. C.-N. Y. 52, V. P. S. C. 32.
87	A-619			A-502	72-B	P. U. C.-N. J. A-26, P. S. C.-N. Y. A-126, Ohio A-26.
86	A-606			A-505	72-B	
	A-635			A-475	72-C	
	①378			①3325		
	①3324			①1327		
81	A-574			A-572	73-E	Ohio 2882.
40	A-694			A-467	82-C	
	①460			①2902		
134	A-726	A-33		A-494	83-D	
	②443	①69		①2880		
	②3800	①76		①1762		
	①724	①302				
942 22	A-982				87	
	①191					
80	A-633			A-413	89-A	
	①377			①2894		
96		A-43			89-A	
		①58				
121	A-797	A-60	A-4	A-627	90-J	K. R. C. A-14, P. S. C.-Md. A-66, P. U. C.-N. J. A-24, P. S. C.-N. Y. A-134, Ohio A-24, Pa. P. U. C. A-116, Va. C. C. A-62, Vt. P. S. C. A-23, P. S. C.-W. Va. A-78.
20	A-808			A-547	93-G	P. S. C.-N. Y. A-137, Pa. P. U. C. A-117.
19	A-450			A-275	94-A	
11	A-813			A-583	96-B	
30	A-794			A-488	101-B	

	A-839	A-37			103-G	P. S. C.-Md. A-31, P. U. C.-N. J. A-37, P. S. C.-N. Y. A-142, Pa. P. U. C. A-119, Vt. P. S. C. A-26, Va. C. C. A-24, P. S. C.-W. Va. A-20.
	ⓓ830	ⓓ70			103-G	Conn. P. U. C. 11, Maine P. U. C. 44, M. D. P. U. 31, N. H. P. S. C. 26, R. I. P. U. A. 34, P. S. C.-N. Y. 29, Vt. P. S. C. 29.
25						
	2-2686	ⓓ136			ⓓ101-E	Ill. C. C. 302, Ind. R. C. D-735, K. R. C. 91, Mich. P. S. C. 602, P. S. C.-N. Y. 276, Ohio 2143, Pa. P. U. C. 214, P. S. C.-W. Va. 288.
	ⓓ892	ⓓ64			171-E	Ill. C. C. 288, Ind. R. C. 182.
24	A-685			A-678	103-A	
	A-816	A-54		A-584	104-D	
	ⓓ519	ⓓ67		ⓓ430		
25	ⓓ2083	ⓓ120		ⓓ1626		Ohio 2136.
	ⓓ586	ⓓ63		ⓓ61		
	ⓓ975	ⓓ134				
30	A-685			A-598	105	
	A-787	A-59		A-513	107-C	
62	ⓓ479	ⓓ57		ⓓ404		
	ⓓA-3440	ⓓA-140		ⓓA-604		
	A-801			A-381	109-B	
32	ⓓ357			ⓓ306		
	ⓓA-3973			ⓓA-668		
		A-21			109-B	
70		ⓓ35				
		ⓓA-33				
28	A-838			A-733	111-A	
56	A-723			A-686	114-C	
10	A-839			A-634	115-B	P. S. C.-N. Y. A-103.
142	A-788				116-B	P. U. C.-N. J. A-62, P. S. C.-N. Y. A-153.
	A-847	A-37		A-349	119-A	
	ⓓ332	ⓓ61		ⓓ277		
18	ⓓ2062	ⓓ81		ⓓ2015		
	ⓓ2225	ⓓ228		ⓓ39		
	A-726				130-B	
26	ⓓ441					
	ⓓ3427					
	A-732				121-B	
	ⓓ446					
36	ⓓ3613					
	ⓓ3440					
			A-6		121-B	
6			ⓓ7			
			ⓓ11			
			ⓓ6			
28	A-727	A-21		A-685	122-C	
	ⓓ442	ⓓ48		ⓓ579		
16	A-717				125-D	
	ⓓ3681					
41	A-721			A-630	126-A	
	ⓓ129			ⓓ1307	ⓓ42-A	
25	A-867			A-367	136	

For explanation of reference marks, see page 570 herein.

Number of this supplement	I. C. C. No.	MF-I. C. C. No.	FF-I. C. C. No.	C. T. C. No.	Tariff No.	State commission numbers
	A-730	A-49		A-529	129-B	Ohio A-23, V. C. C. A-61.
	⑦469	⑦23		⑦419		
44	⑧2583	⑧124		⑧1870		
	⑨466	⑨22				
6	A-735			A-545	130-B	
	A-733			A-530	123-B	
48	⑦8743			⑦1837		Ohio 2100.
	A-734			A-542	128-C	
942 81	⑧2579			⑧1831		Ohio 2100.
	A-695			A-544	134-B	
7	⑦510			⑦439		
	⑧2601			⑧1905		
13	A-614			A-553	136-A	
	A-626			A-555	137-A	
5	⑦526			⑦447		
10	A-730				129-B	P. S. C.-Md. A-47, P. S. C.-N. Y. A-127, Pa.-P. U. C. A-109.
13	A-731				129-C	P. S. C.-Md. A-42, P. S. C.-N. Y. A-128, Pa.-P. U. C. A-110.
	A-695			A-561	140	
38	⑦422			⑦361		
	A-536	A-36	A-5	A-571	141-B	
	⑦539	⑦71	⑦6	⑦465		
11	⑧2626	⑧130	⑦8	⑧1888		
	⑨103	⑨36	⑦8	⑨227		
25	A-734			A-580	142	
56	A-801			A-581	143-A	
⑨1	A-644			A-574	145-B	
	⑦4765			⑦1876		Ohio No. 2178.
17	A-771			A-516	140	P. S. C.-N. Y. A.-132, Pa. P. U. C. A-114, V. C. C. A-69.
	A-794			A-523	149	
5	⑦524			⑦424		Maine P. U. C. 42.
	⑧2643			⑧1887		
5	A-625				152	
	A-633				154-A	Ill. C. C. A-2, Ind. R. C. A-4, P. S. C.-Md. A-52, P. U. C.-N. J. A-28, P. S. C.-N. Y. A-146, Pa. P. U. C. A-121, Vt. P. S. C. A-26, Va. C. C. A-66, P. S. C.-W. Va. A-62.
	⑦633				⑦39-A	Conn. P. U. C. 13, Maine P. U. C. 47, M. D. P. U. 12, N. H. P. S. C. 46, P. S. C.-N. Y. 61, R. I. P. U. A. 28, Vt. P. S. C. 42.
5	⑦4782				⑦622	Ill. C. C. 542, Ind. R. C. D-733, K. R. C. 32, Mich. P. S. C. 504, P. S. C.-N. Y. 272, Ohio 2180, Pa. P. U. C. 258, P. S. C.-W. Va. 296.
	⑦633					Ill. C. C. 599, Ind. R. C. 164, P. S. C. Mo. 42.
4	A-643	A-42			144	
	⑧2660	⑧128				

⑦ I. F. Kipp, Agent. ⑧ R. E. Hale, Agent. ⑨ D. O. Marsh, Agent.
① L. Ode, Agent. ② W. H. Williams, Agent. ③ A. H. Dorsey, Acting Agent.

944 Before the Interstate Commerce Commission

Docket No. 28714

SWIFT & COMPANY

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

Railroad defendants' petition for reconsideration, reargument, and modification of findings

945 Come now The Baltimore & Ohio Railroad Company, The New York Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company, Erie Railroad Company, and The Wheeling & Lake Erie Railway Company, railroad defendants in the above entitled proceeding, and file this, their petition for reconsideration, reargument, and modification of findings; and in support of said petition, respectfully show:

In report and order, dated May 3, 1946, Docket 28714, the Commission found that the present practice of defendants (among which is The Cleveland Union Stock Yards Company) in refusing to deliver to the sidetrack of Complainant, in Cleveland, Ohio, interstate shipments of livestock, carried over their lines and consigned thereto, is in violation of section 3 (1), section 1 (6), and section 1 (9), of Part I of the Interstate Commerce Act; and ordered said defendants, or either of them, to (1) cease and
946 desist, on or before the 30th day of August 1946, and thereafter to abstain from refusing to deliver to said sidetrack complainant's interstate shipments of livestock carried over defendants' lines and consigned thereto; and (2) to establish and put in force, on or before the 30th day of August 1946, upon not less than thirty days' notice to this Commission and general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to said sidetrack of complainant's interstate shipments of livestock carried over defendants' lines and consigned thereto; said order to remain in full force and effect until the further order of the Commission.

On July 19, 1946, a request by letter was made to stay the effective date of the order pending the decision of the Commission with respect to this petition. A telegram dated July 25, 1946, received from the Hon. Ulysses Butler, states that the effective date of the order is "postponed to October 30 on fifteen days' notice."

I

Railroad defendants are somewhat perplexed at the misconstruction and misapplication of law and the court decisions and also at the inconsistent and contradictory observations and conclusions contained in the report and order of the Commission dated May 3, 1946, on which the Commission based its finding in favor of the complainant. Our amazement is further increased when we consider that two hearings have been held and two separate reports[1] proposed by three different Examiners recommended dis-
947 missal of the complaint. Railroad defendants contend that a proper construction of the law and the few applicable court decisions which are available, as well as the important history of complainant's relationship with the Stock Yards Company, have been entirely ignored, in considering the principles involved in this novel and unprecedented question, which has many important and interesting phases. The conclusions reached in the report and order of May 3 are unsupported by any evidence in the record or any applicable law or any fair interpretation thereof. This report and order provides a striking contrast to the two reports of the Examiners whose findings in favor of the defendants were based upon undisputed facts in the record and such applicable law as was available.

The decision

(1) erroneously assumes facts to which have been applied erroneous interpretations of law and decisions found in complainant's brief, and fails to consider, or completely and unjustifiably ignores, the facts and applicable decisions which are presented in railroad defendants' Reply to Exceptions of Complainant, dated September 25, 1945.

(2) Utterly disregards the practices and rules promulgated by the Commission in connection with Ex Parte 104, Part II, Terminal Services, which practices and rules were upheld by the United States Supreme Court in U. S. of A. and I. C. C. vs. American Sheet and Tin Plate Company, et al., 301 U. S. 402–412, decided October 11, 1937.

(3) Would require an absolute violation by the New York Central of the practices and rules prescribed in Ex Parte 104.
948 (4) Would provide complainant with such superior services and conveniences as constitute undue preferences and advantages which are not extended, or required to be extended, to shippers generally.

[1] April 1943, Paul O. Carter, Examiner.
June 1945, T. Leo Haden and A. J. Banks, Examiners.

(5) Ignores entirely the uncontradicted early history and circumstances, including the history of the relationship between the complainant and the Stock Yards Company which gave rise to the present controversy. This omission is, indeed, a pronounced contrast to the position taken by the Commission in determining the issues in the Chicago Stock Yards Case (Swift & Co. vs. Alton Rd., et al., 238 I. C. C. 179), which was affirmed by the United States Supreme Court May 4, 1942, in Swift & Co. vs. United States, 316 U. S. 216, 86 L. Ed. 1391. The early history of the relationship between Swift and Company and the Stock Yards Company in the instant case is equally as important as was the relationship between the packers and the Stock Yards enterprise at Chicago, which was considered by the Commission and the Court as being extremely important.

(6) Contains assumptions of fact which cannot possibly be supported by the record.

(7) Unjustifiably and inequitably penalizes the New York Central for having obtained the best arrangement possible for the use of the 1,619 feet of track owned by the Stock Yards Company for delivery of such commodities consigned to complainant's plant as the owner of the track would permit to be moved thereover, after which complainant, while a stockholder in, and having its General Manager a member of the Board of Directors of, the Stock Yards Company, instituted the practice of consigning carload shipments of livestock to complainant's plant over the
949 track owned by Stock Yards, which shipments the Stock Yards Company considered to be competitive to its primary business.

(8) Tends to take the property of the Stock Yards without due process of law.

(9) Ignores the fact that, through the relationship and dealings which existed for many years between complainant and the Stock Yards Company, complainant had full knowledge at all times of the carefully guarded control retained by Stock Yards Company of its 1,619 feet of track and the restricted use thereof all of which certainly creates in any court of law or equity an estoppel to complainant's now asserting that this is a public spur in which it has acquired a vested interst.

(10) Would create prolonged, fruitless, litigation between the New York Central and the Stock Yards Company, inasmuch as the Commission lacks power to enforce its order so far as said order would subject the property of the Stock Yards Company to use for the benefit of complainant or the railroad.

(11) Tends to create new rights for the future for complainant, rather than disposing of the controversy involved under present contracts and existing practices.

(12) Indicates that the majority of the Commission has, by implication, recognized that the 1,619 feet of Stock Yards track has not become dedicated to public use, yet the report fails to give any factual recognition or legal effect whatever to that fact; rather the Commission seems to have strained throughout its report to nullify and circumvent that fact in contrast to the dissenting Commissioner's frank and open meeting of that undisputed fact in the record.

(13) Indicates that the majority is utterly inconsistent in acknowledging that the Stock Yards Company may
950 withdraw its 1,619 feet of track from use altogether but cannot lawfully limit its use—a proposition which literally flies in the teeth of common sense and the fundamental concepts of the law of property.

In addition, railroad defendants submit that they are unable to see how the order can be carried into effect. Five of the railroad defendants do not have any track connection with the 1,619 feet of track owned by Stock Yards Company, so that these five railroad defendants certainly cannot publish any tariffs providing for service over that track, and are not in position to negotiate any arrangement for the use of that track under the existing circumstances. These railroads are entirely dependent upon whatever arrangement the New York Central can effectuate.

The New York Central is left helpless and in an unprecedented and most incongruous position. It is not clothed with power to compel the Stock Yards Company to extend the use of its 1,619 feet of track to the New York Central to make possible the delivery of carload shipments of livestock to the private siding of complainant, as is required by the order of the Commission. The Stock Yards Company remains adamant in its refusal to permit the use of its track for the movement thereover of competitive shipments of livestock except for compensation approximating its handling, yardage, and storage charges. The unyielding position of the Stock Yards Company in this respect has been made clear to the Commission in the two hearings, arguments in connection therewith, and its petition for reconsideration recently filed in this proceeding.

951

II

The foregoing order of the Commission is in direct conflict with and would, in effect, compel the railroad defendants to violate the rules and practices prescribed by the Interstate Commerce Commission in Ex Parte No. 104, Part II, Terminal Services, decided May 14, 1935, 209 I. C. C. 11, et seq., and the numerous decisions of the Commission rendered since the reports contained in Volume

209, in connection with operating practices in terminals and revenues or expenses in connection therewith.

Railroad defendants submit that if the order of the Commission is allowed to stand, that it will, in violation of the rules and practices prescribed by the Commission in Ex Parte 104, require railroad defendants to render a service to complainant which will constitute

(a) An allowance to the complainant by the performance of a service by carriers which is not performed, or required to be performed, for other shippers, generally, and particularly the alleged three competitors, i. e., The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company.

(b) Delivery beyond point of interruption or interference for the convenience of complaints; and

(c) Rendering a service to complainant which is beyond simple placement or team-track spotting of carload shipments.

The principles and reasoning underlying the findings and order in Ex Parte 104 are applicable in their entirety to the facts of the within case. Certainly the action of the Stock Yards Company in restricting the movement of carload shipments of livestock over its 1,619 feet of track constitutes an interruption and interference which is beyond the control of railroad defend-
952 ants. Railroad defendants did not originate the interruption and interference and are powerless to remove it. Complainant initiated the cause by starting to consign carload shipments of livestock directly to its plant, which, because of not having its own direct track connection, necessitated movement over the 1,619 feet of track belonging to Stock Yards Company, without making any known arrangements therefor with the Stock Yards Company, and at a time when complainant was a stockholder in and, through an interlocking directorate, had some control over affairs of the Stock Yards Company. After initiating this practice, complainant increased the volume of such shipments to an extent which the Stock Yards Company alleged was detrimental to its financial interests, which resulted in the Stock Yards Company enforcing restrictions on the use of its 1,619 feet of track for such shipments. So long as the Stock Yards Company sees fit to enforce its restrictions with reference to the movement of carload shipments of livestock over its 1,619 feet of track, any attempt by the railroad defendants to provide service to complainant for its carload shipments of livestock over the Stock Yards Company's tracks would constitute an infringement of the property rights of the Stock Yards Company, would render the railroad defendants answerable in damages in court, and would be enjoinable under the laws of Ohio.

Railroad defendants are unable, under the laws applicable to property rights, to comply with the finding and order of the Commission in the within case, which require the railroad defendants to do an impossible thing. Railroad defendants do not have ownership, dominion or control over the 1,619 feet of track which is solely owned and controlled by the Stock Yards Company,
953 the ownership, dominion, and control of which by the railroad defendants would be necessary in order to comply with the order of the Commission.

Moreover, the service which the Commission is ordering the railroad defendants to provide in this case would cause undue and unreasonable preference and advantage to the complainant, which service is not accorded to shippers generally, and would provide a superior service and convenience to complainant which the Commission has not required be accorded to shippers generally or any other shipper, so far as we are able to determine from the decisions of the Commission.

III

Railroad defendants encounter difficulty in endeavoring to reconcile the contradictions and inconsistencies in the Commission's position that the Stock Yards cannot restrict the use of its track as it sees fit, on the one hand with the Commission's apparent position, on the other, that the Stock Yards can deny the use of the track altogether.

If such an inconsistent position can be reconciled, it is only upon the basis that in the first instance the New York Central is a party (however unwilling) to the restriction by the Stock Yards of the use of its track in violation of the railroad's duties under the Act, if, in fact, The New York Central Railroad Company does violate its duties under the Act in accepting the only reasonable compromise arrangement possible, by direct negotiation with the owner of the track.

Some bewilderment is presented in the finding of the Commission, on sheet 10, reading as follows:

"* * * By the contract, the Stock Yards is not withdrawing its tract from public use but, on the contrary, is contracting
954 for its continued use as part of the railroad's common carrier spur, No. 245. *Whatever may be the right of the Stock Yards to altogether withdraw its track from public use*, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common carrier status of the New York Central's spur No. 245 but that the latter remains with respect to its said spur, as much subject to the Act and its provisions as it is with respect to any other part of its

railroad or facilities whereby it performs terminal services at Cleveland or other places." [Italic ours.]

and on sheet 12 the Commission finds:

"* * * *Whatever may be the Stock Yard's right to altogether withdraw its track from public use, in our opinion it may not, so long as contracting for its continued public use,* exact compensation on any such basis. *In any event, here we must look to the present contract and act on the existing practices. We cannot conjecture as to the future arrangements further than to assume that they will be lawful. Under the present contract* the New York Central is obligated to maintain track 1619 in good condition and repair but it seems manifest, and we so conclude, that, by resuming its duty to make deliveries of livestock over its spur, it will not incur lawful obligation to pay yardage charges assessed as a penalty if it performs such a duty." [Italics ours.]

The foregoing italicized qualifications apparently warrant the following comment in the dissenting opinion of Commissioner Splawn on sheet 22:

"There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use."

The foregoing inference is also consistent with the rec-
955 ognition which the Commission gives to the right of the Stock Yards Company and New York Central to contract with respect to the use of the Stock Yards' track within the limitations expressed by the Commission's decision and the failure of the Commission to adopt the position taken by complainant that this track had become dedicated to a public use and could not be withdrawn from public service.

Many inconsistent observations and conclusions in the decision are indicative of the uncertainty and doubt which must have existed in the minds of the Commission with respect to what relief, if any, could be granted complainant by the Commission.

If the objectives of the statutory provisions and the decisions upon which the Commission relies are adequacy and uniformity of public service, certainly the New York Central's action in securing on such terms as may have been or may be obtainable, partial use of the track for traffic other than livestock, should be considered to bring the New York Central more nearly in line with legislative policy than a course of action which would foreclose the benefits of the track altogether.

As owner of the 1,619 feet of track, and having retained control thereof at all times (with full knowledge thereof by the complainant conclusively removing any justification for finding a dedication to public use), the Stock Yards Company would, under the law, as we understand it, have the right to take out the rails and

remove the track from any use, unless the Commission can be found to be clothed with power over the Stock Yards to prevent it from so doing, or a Court having jurisdiction of the Stock Yards' property would enjoin the Stock Yards Company or decree otherwise.

In this connection, there is justification for concluding
956 that the majority is in the inconsistent and unrealistic position of suggesting that the legislative policy would more nearly be accomplished by withdrawing all benefits of the track and leaving the complainant and other shippers who are dependent upon its use, completely without rail service. This inconsistent position seems to be fostered by other unrealistic aspects of the Commission's reasoning, where, on sheet 7, the Commission states the principal issue, as follows:

"The carrier's defense presents the question of whether a railroad, by entering into a contract with the Stock Yards Company aimed at compelling shippers making livestock shipments to Swift and the other industries beyond the track of the Stock Yards Company to use the facilities of the Stock Yards Co., can abrogate obligations placed upon it, in the public interest, by the Interstate Commerce Act. It is our opinion that it can not, and that the relief sought by Swift should be granted."

and on Sheet 12 the Commission also states:

"It seems evident and, in any event, will be shown, that the railroad could not lawfully single out and exclude livestock from the traffic transported over its common carrier spur."

The foregoing quotations from the decision indicate that for the purpose of its findings the Commission seems to treat the New York Central as an initiating party, along with the Stock Yards, in the special arrangement with respect to the use of the Stock Yards' track as to livestock and that this restriction is the product of joint motivation on their part. This implication in its particular context in the report seems to be misleading, unrealistic from the standpoint of the evidence, and exceedingly prejudicial and unfair to the New York Central. It cannot be reconciled
957 with the true picture as presented in the quotation from the oral argument of counsel for the New York Central at the top of sheet 16 or with other discussion on sheet 11 of the Stock Yards' motives for "the very singling out of livestock for the requirement of special compensation from the railroad * * *." *In finding for complainant, the Commission in the first of the foregoing quotations states the question at issue in this case in a manner which begs the question and makes the answer in complainant's favor a foregone conclusion. The problem in this case should not be approached in that manner but the issues and facts should be faced forthrightly.*

When the issue in any case is not stated in an impartial and complete manner, it is practically a foregone conclusion that the ruling on the issue will be erroneous—as it proves to be in this case. We respectfully submit that the manner in which the issue in this case is stated at the outset, on Sheet 7, in and of itself condemns this report. It does not state the true issue at all, but apparently reflects a fancied determination to spell out a case for complainant.

There is nothing in the record to justify any assumption by any one that the New York Central instigated in any way whatsoever the restrictions placed on the 1,619 feet of track owned by the Stock Yards Company or that the restrictions are beneficial in any way to the New York Central. The record is replete with evidence showing that the complainant, with full knowledge that the 1,619 feet of track was owned by the Stock Yards Company, and after full consideration and long deliberation, chose to, and did, provide the right-of-way and obtain an ordinance permit to cross West 65th Street so as to enable it to procure an indirect track connection with the New York Central main tracks by using
958 the 1,619 feet of track owned by the Stock Yards Company with all of the attendant uncertainties (of which the present development is one), rather than to provide its own direct connection with the New York Central's tracks at the northerly end of West 63rd Street.

This last-mentioned direct track connection to complainant's plant could have been provided at any time by complainant so as to entitle complainant to all of the rights which complainant is now demanding. However, complainant deemed such direct track connection to be economically undesirable because from 1908 to 1930 complainant was contented to accept delivery of its car load shipments of livestock through the unloading facilities of the Stock Yards and the delivery of its other commodities at its plant by the use of the 1,619 feet of track owned by the Stock Yards Company.

The treatment of the factual situation in the decision is somewhat in contrast to the candid presentation of the same situation bearing upon the past relationships of Stock Yards, New York Central and Swift & Co. set forth at length in the report of the entire Commission in The Baltimore & Ohio Railroad Co. vs. The Cleveland Union Stock Yards Co., 255 I. C. C. 579–598. The latter report makes it perfectly clear that the Stock Yards Company did in the past, and still does, completely dominate and control the use of Track 1619, and further, that complainant's past course of action largely contributed to placing it in its position of dependence upon that track. In the present report this aspect of the record is ignored—it is left to the dissenting Commissioners

to portray the true situation. The inconsistency between the pictures painted in these two reports is certainly unjustified in view of the stipulation made in Docket 28714 that the facts stated
959 in the Commission's decisions in Finance Docket No. 14038 and No. 28421, and related dockets (255 I. C. C. 579, *supra*), could be considered as facts in the present proceeding. There is no dispute as to facts in the detailed report in Docket No. 28421 and related cases, which are set forth candidly and in full.

All provisions pertaining to the use of the 1,619 feet of track owned by the Stock Yards Company and all restrictions of every kind pertaining to that track were dictated by the owner of the track. The failure of the New York Central to accept such terms and conditions might very likely have resulted in the owner closing the track to all commodities. The New York Central should not be penalized simply because the complainant, in its highly favored relationship with the Stock Yards Company during those long years of intimate dealings, succeeded in creating a situation by degrees which led to the use of the 1,619 feet of track owned by the Stock Yards Company for movement of carload shipments of livestock to complainant's plant, which the Stock Yards Company considered to be competitive to the Stock Yards' own business, as well as being financially detrimental thereto, and then to have the Stock Yards Company withdraw from service such use of its track, leaving the New York Central an innocent and helpless victime between the respective interests of the Stock Yards Company and the complainant.

Furthermore, throughout the discussion on sheets 9 to 14, inclusive, the Stock Yards Company track is so related to that of the New York Central spur 245 that the former seems to assume the color and character of the latter in the consideration of the Commission. On sheet 9, the Commission says:
960 "* * * Obviously the fact that the New York Central, acting in compliance with its private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over *its spur* does not alter the fact that the use it is making of the spur, including Track 1619, is generally for all traffic offered and all industries reached and is not one confined to the serving of the Stock Yards or other particular plant. * * *" [Italics ours.]

The record would not seem to justify any suggestion that the failure to make delivery pertains to the New York Central's spur No. 245. While the two tracks are related in purpose, they are not related from the "refusal-to-transport" angle. The effort of the Commission to relate them in the latter sense again emphasizes the majority's unrealistic and confused approach to the facts and

legal issues involved. But for the Stock Yards Company's absolute control over track 1,619 this case would not have arisen. There is not a particle of dispute about that. It is the central fact around which this entire case turns. The dissenting Commissioners face this fact squarely but the Commission strains to give it no effect.

IV

The decision finds a violation of section 3 (1), which is based upon misstated facts, some of which are contained in the second full paragraph on sheet 5. To conform with the record that part of the decision should read as follows:

"From 1910 until the present time railroad defendants transported all classes of freight, exclusive of livestock, to and from complainant's siding over the 1,619 feet of track owned by the Stock Yards Company. From January 1, 1930, to February
961 1, 1935, Swift & Co. received 1,161 carloads of livestock, at its plant siding over the 1,619 feet of track owned by the Stock Yards Company.

"Railroad defendants also transport carload shipments of livestock to the private sidetracks of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, whose plants are in the same general locality as the Stock Yards, *but said three competitors have their own private sidetracks connecting directly with the main tracks of The New York Central Railroad*, without any intervening privately owned sidetrack, and they are served by The New York Central Railroad without using tracks belonging to the Stock Yards."

Again, on sheet 13, a similar statement is repeated and the conclusion is reached that

"this service is performed by defendant carriers at the line-haul rate to Cleveland and the three plants are all located in the same general section of the New York Central's Cleveland Yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, *the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business*, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory; *and that active competition exists between them in purchasing the live animals and in selling the dressed products.* Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's

plant, to accord delivery thereof on the latter's sidetracks, while according such service in connection with like shipments
962 consigned to its competitors, subjects complainant to undue prejudice and unduly prefers the competing plants above named."

The first principle in the Commission's many decisions with respect to Section 3 issues is that the circumstances and conditions applying to the compared situations must be substantially similar. They are not substantially similar in the cases discussed in the decision because of the Stock Yards Company's control over its track, as pointed out in Commissioner Splawn's dissenting opinion. In the recital of facts on sheets 5 and 13 referred to above, the Commission recognizes this distinguishing fact, for it says that the defendant carriers are transporting shipments of livestock "directly to the plants of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, whose private sidetracks are adjacent to the Stock Yards *but are served without using tracks of the Stock Yards.*"

It would be difficult to conceive of a more substantial distinction between the situation of the last-named packers and the complainant than that arising from the fact italicized above. If the Stock Yards Company exercised its implied right to close its track altogether, the distinction could scarcely be overlooked. In the teeth of this distinction, the Commission then proceeds to find, on sheet 13, that undue prejudice against complainant exists because

"all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territories; and that active competition exists between them in purchasing the live animals and in selling the dressed products."

963 Then, on sheet 5, the Commission also states:

"* * * the three competitive plants are all located in the same general section of the New York Central's Cleveland Yard as that in which complainant's plant is located."

In calling to mind the Commission's close heed to the peculiar facts of each situation and decisions under Section 3, including those involving rights as to tracks, it seems highly inconsistent and a wide departure for the Commission in this instance to push to the background such a salient factual distinction as the Stock Yards Company's control of its 1,619 feet of track and to place in the forefront, as a basis for a finding of Section 3 violation in this controversy, such general indistinctive factors as (a) the existence of business competition among the packers involved, and (b) the proximity of these packers to the New York Central's Cleveland

Yard. Rex Jellico Coal Co., et al., vs. L. & N. R. R. Co., 237 I. C. C. 67, at pages 70–71; Certain-teed Products Corp. vs. CRI&P Ry. Co., et al., 68 I. C. C. 260; Winnsboro Granite Corp. vs. Southern Ry. Co., 176 I. C. C. 481, page 483; Clover Splint Coal Co. vs. L. & N. R. R. Co., 197 I. C. C. 276, at page 277.

Under the latter general conditions, almost any difference in treatment, however short of being an undue difference, would lay the major foundation for a Section 3 violation. The Commission could certainly call to mind all manner of situations which have come before it wherein such common factors as business competition and physical proximity have applied to the compared situations and yet the Commission has found no Section 3 violation to exist because of peculiar trackage or other conditions pertaining to one party, but not others. In this case, however, the
964 Commission strains the other way in order to find, among the most general factors in the packers' situation, some common denominator basis for Section 3 violation.

V

The decision indicates that the Commission has assumed certain facts which are absolutely at variance with the record and reached many conclusions which are erroneous. It has erroneously assumed that:

(1) Complainant did not knowingly and wilfully choose to obtain service to its plant, indirectly, by the use of the 1,619 feet of track owned by the Stock Yards Company rather than build its own track to a direct connection with a main line switch of the New York Central at the northerly end of West 63rd Street.

(2) The restrictions in the contract between the Stock Yards Company and the New York Central for the use of the 1,619 feet of track were sought by the New York Central, accompanied by some motive tending toward collusion with the Stock Yards Company to increase receipts of revenues by the Stock Yards.

(3) The defendants' line-haul rates for transporting carload shipments of livestock to Cleveland are sufficient to constitute reasonable compensation to the carrier, regardless of the charge which may be exacted by the Stock Yards Company as owner of the 1,619 feet of track for the use thereof for delivering carload shipments of livestock to complainant.

(4) The complainant is entitled to have delivery of carload shipments of livestock resumed over the track owned by Stock Yards Company so as to enable complainant to build and construct unloading chutes and facilities which have not been in exist-
965 ence in the past, and thus be able to unload at one time

several carloads of livestock as contrasted with the practice in the past, when only one carload could be unloaded at one time.

(5) If the service sought by complainant in its complaint is restored, complainant could receive its carload shipments of livestock without undue preference and advantage, which is not a fact.

(6) The undue preference and advantages which complainant enjoyed by reason of its imposition upon railroad defendants and the Stock Yards Company in consigning its shipments for delivery over the 1,619 feet of Stock Yards' track should be restored to complainant when such superior services and conveniences are not extended, or required to be extended, to shippers generally.

(7) The service rendered to the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company is similar to the undue preference and advantage in service which is sought by complainant; and

(8) It is possible for the railroad defendants to negotiate an arrangement with the Stock Yards Company to carry out the order of the Commission, as discussed on sheet 11, where the Commission says: "* * * the railroad could, so far as the contract was concerned, have followed the same course and thus have avoided the payment of any compensation, or charge, specially set up against the use of the track for the carriage of livestock."

Therefore, the railroad defendants urge that the facts outlined and the application of the law made in the report proposed by Examiners T. Leo Haden and A. J. Banks, are correct, and said report, with the findings in the last paragraph thereof modified as shown in the next paragraph hereinafter, should be adopted as a correct statement of the facts and findings of the Commission.

966 The Commission should dispose of the within complaint by finding that:

"That railroad defendants' failure to transport livestock directly to complainant's siding, over Stock Yards' track 1,619, is not shown to have been, or to be, in violation of the Interstate Commerce Act, as alleged. The technical departure from the provisions of section 6 (7) existing in certain tariffs discussed in the report should be corrected promptly by railroad defendants; however, this irregularity in the tariff is unimportant because we find that complainant had intimate knowledge at all times of the limited and restricted use of track 1,619 permitted by the Stock Yards Company. Railroad defendants could not, and cannot now, be expected to remove this obstacle over which they have no control. Complaint is, therefore, dismissed."

VI

This report and order is somewhat complex and confusing and makes difficult a discussion of its various phases in any orderly array. In the preceding part of this petition we have attempted to present the main points upon which we rely for showing the necessity and justification for granting a reconsideration, reargument, and modification of findings. *However, particular attention is directed to the conclusions beginning at page 38 which contain a full discussion of the available applicable law.*

In this Section VI other errors, inconsistencies, and misstatements in particular portions of the decision are discussed, which should be corrected if the complaint is not dismissed and which embrace, among other subjects, the following items of particular importance.

(1) Complainant's full realization of the chances it took
967 in using the 1,619 feet of track owned by the Stock Yards Company and the railroads' helpless situation in connection therewith, subheading (c).

(2) Complainant's desire to now enlarge its unloading facilities if delivery direct to its plant can be restored without cost to complainant, subheading (d).

(3) Distinguishing the case of Guyton & Harrington Mule Co. v. L. & N. R. R. Co., 50 I. C. C. 546, 550, subheading (g).

(4) Suggested short paragraph which would dispose of the irrelevant and confusing statements and erroneous conclusions which begin with the second full paragraph on Sheet 9 and extend to Sheet 14, subheading (h).

(5) Distinguishing the case of Cleveland, etc., Ry. Co., v. U. S. of A., et al., 276 U. S. 404, which was misapplied on Sheet 15 of the decision, subheading (j).

(6) A correct digest of the Baltimore Butchers Livestock Co. case, 20 I. C. C. 124, subheading (1).

(a) On Sheet 4, tenth line, in second full paragraph, the words "interested parties were" should be corrected to read "Complainant was." See Record Ex. 14, in which facts are stipulated showing that Swift & Co. was unwilling to spend $24,500.00 to build its sidetrack to connect directly with the right-of-way of the New York Central.

(b) On Sheet 4, the last sentence in third full paragraph should be deleted, and the following should be substituted therefor:

"At the request of complainant, and after complainant provided the right-of-way, and a permit from the City Council to build a track at grade across West 65th Street, the New York Central constructed the track and extended it to complainant's
968 plant, laying the track on right-of-way provided by com-

plainant in easements from the Stock Yards, complainant, Thurer-Norton Provision Company and other parties with whom arrangements were made by complainant."

See Exhibit No. 29, Record 208 and 217, and Sheet 10 of Exhibit 30, which support this requested substitution.

(c) The last paragraph on Sheet 4, and ending at top of Sheet 5, should be amplified by showing at the end thereof:

"Also, numerous other provisions, among which is the following:

"'Fourth. The Railroad shall have the right to cease, forthwith, and without notice, all operations upon said track, if compelled so to do by the owners, other than the respective parties hereto, of any portion of said track, or of the land upon which said track, or any portion thereof may be laid.'"

The next above quoted provision in the private sidetrack agreement between complainant and the New York Central on February 1, 1935, was made necessary because of the demands of the owner of the 1,619 feet of Stock Yards Company's track and should have indicated to complainant that the "owners of any portion of said track or of the land upon which said track or any portion thereof, may be held" might make new demands at any time, and failure of the New York Central to accept such terms as it could obtain for the use of the 1,619 feet of track owned by the Stock Yards Company might very likely have resulted in the owner closing the track to all commodities. Rather than discontinue service entirely to these industries, the New York Central accepted the course which enabled the shippers to obtain service to the greatest extent possible.

969 The record indicates clearly that complainant cannot claim, justifiably, that it was not fully aware, at all times, of the limitation imposed by the Stock Yards Company on the use of its 1,619 feet of track, inasmuch as the record is replete with evidence indicating complainant's awareness of such restricted and limited use of track 1,619, and also of complainant's choice of having its plant served by using the 1,619 feet of track owned by Stock Yards Company, rather than incurring the expense necessary in order to get complainant's own track connection directly with the New York Central main track, at the northerly end of West 63rd Street.

We direct your attention to the fact that in March 1910, Swift and Company indicated to the Freight Traffic Manager of the Big Four (Ex. 11) that inasmuch as it seemed impossible to do anything with a direct connection with the Big Four main track along Prim Avenue (now West 63rd Street), Swift believed that some arrangement might be made to get a sidetrack into the Peoples Packing Company plant (which was then owned by Swift and Company) by crossing West 65th Street (then known as Gordon

Avenue) and connecting in some manner with the 1,619 feet of track owned by the Stock Yards Company. The Big Four indicated its willingness to build the track across West 65th Street if Swift and other packers along West 63rd Street would furnish the right of way with perpetual easement for this track without cost and would obtain permission to cross West 65th Street with the track at grade.

Swift obtained this ordinance permit to cross West 65th Street with the track in order for Swift to obtain a connection with the 1,619 feet of track owned by the Stock Yards Company and thereover to reach the main line tracks of the Big Four (Ex. 29).

970 The right of way for this track east of the east line of West 65th Street was also procured by Swift and deeded to the Big Four. It included a small parcel of Sublot No. 166 adjoining the easterly side of West 65th Street. This Sublot No. 166 belonged to the Stock Yards Company (R. 208 and 217), which company, at the instance of Swift, conveyed an easement to the Big Four over said Sublot No. 166 (containing 1,024 square feet)—see sheet 10 of Ex. 30, which deed of conveyance contained the following reservation by the Stock Yards Company:

"It is understood however that in the event a connection between the Prim Street track and the main tracks of said Railway Company is made at or near Clark Avenue said grantor (Stock Yards Company) reserves the privilege of having the connection switch between the Prim Street track and the Stock Yards track removed."

In view of the foregoing evidence, can there be any question in anyone's mind that the complainant fully realized the uncertainties attendant upon transporting all commodities to and from its plant by the use of the 1,619 feet of track owned by the Stock Yards Company? Complainant full realized this and chose to assume whatever chances it may have to take in that respect.

(d) On Sheet 5, first full paragraph, fifth sentence, beginning in the eleventh line, the wording should be changed to read as follows:

"Complainant claims that by constructing movable platforms and placing them alongside the cars, several cars of livestock could be unloaded at one time hereafter; however, such operation has not been in effect in the past, and, therefore, is not of any consequence in this controversy."

971 If, as the report indicates, the Commission is addressing itself only to "the present contract" and the "existing practices" and not to future arrangements, it would seem to follow that if the "present practice" referred to in the order respecting delivery of livestock were changed by the Stock Yards Company's withdrawal altogether of its track from all use, the order of the Commission would become moot and inoperative.

Again, under the present contract and the practice which existed, complainant's facilities would not permit placing more than one car at a time for unloading, whereas complainant now seeks to provide for a new situation whereby it can build portable chutes and unload several cars at a time if it can get service restored for delivery of carload shipments of livestock directly to its plant.

(e) On Sheet 7, the last two sentences, in paragraph ending at top of sheet, should be changed to read as follows:

"A charge of $4 per deck, for performing the services of loading and unloading shipments of ordinary livestock at the stock yards, was paid and borne by the road-haul carriers from January 15, 1940, to and including June 9, 1942, which included the controversial question of delivery to complainant and all other consignees accepting rail-borne shipments of livestock through the Stock Yards' pens."

"The railroad defendants agreed to pay this charge in order to prevent interruption of the loading and unloading service in connection with carload shipments of livestock, pending the determination by the Commission of a reasonable charge for such service." 255 I. C. C. 579, decided May 11, 1943, fully supports this statement.

972 (f) On Sheet 7, the first full paragraph should be corrected to read as follows:

"Between 1916 and 1936, complainant owned stock in the Stock Yards' corporation. At the request of complainant's president, its plant managers at Cleveland from November 2, 1916, to April 28, 1936, were continuously made directors of the Stock Yards and were on the executive committee when there was such a committee. From 1920 to 1924 the traffic managers of complainant, the Stock Yards, and the Cleveland Provision Company formed a traffic committee which actively considered transportation matters. By order of the Supreme Court of the District of Columbia, dated January 31, 1931, complainant was directed to divest itself of ownership in public stock yards which was accomplished at Cleveland by February 8, 1936."

The foregoing phraseology is taken from the report proposed by Examiners, and is a correct recitation of the facts.

(g) On Sheet 7, in the third full paragraph, the third sentence should have added to it:

"unless and until such time as complainant makes arrangements for the use of the 1,619 feet of Stock Yards Company's track to transport shipments of livestock to complainant's plant siding." In the fifth sentence of the same paragraph, reference to the Guyton & Harrington Mule Co. vs. L. & N. R. R. (50 I. C. C., 546,

550), being "in respect of a somewhat similar situation at Nashville, Tenn." is erroneous.

There was not any restricted use of track or facilities or barriers of any kind, in the Guyton & Harrington Mule Co. case, in anywise similar to the conditions existing in the within case. The railroads admitted in that case that the new Stock
973 Yards, which had been designated the exclusive livestock depot of the railroads, were not adequate for handling mules and livestock other than ordinary livestock. When service was discontinued at the old Stock Yards, where the facilities were peculiarly suitable for loading and unloading mules for many years past, complainants had been damaged and were entitled to redress.

The Guyton & Harrington Mule Co. case has no application here and should be deleted from the report.

(h) Beginning with the second full paragraph on Sheet 9, and extending to the end of Sheet 14, all wording should be deleted, and in place thereof should be inserted the following:

"However, the relief sought in this complaint cannot be supplied under the Interstate Commerce Act, or by the Commission. Complainant should consider obtaining its own track connection directly with the New York Central main line right-of-way as a solution."

Among the reasons for suggesting the deletions hereinabove in this item, are that there are erroneous statements of facts which lead to erroneous conclusions; there is repetition of preceding portions of the report and arguments which are unsupported by the record and irrelevant to the actual controversy. This "dust-cloud" complicates and unjustly confuses the issue which will very likely find its way into a Court of law.

(i) On Sheet 15, the first full paragraph referring to the cases of I. C. C. vs. D. L. & W. R. R. Co., 216 U. S. 531, 537, and U. S. vs. B. & O. S. W. R. R. Co., 226 U. S. 14, 19, should be deleted, because of irrelevancy.

(j) On Sheet 15, the second paragraph relating to the au-
974 thority conferred upon the Commission by Section 1 (9) of the Act as held in the case of Cleveland, etc., Co. vs. U. S., 275 U. S. 464, probably has some bearing upon this controversy by way of contrast. In that case the *Mine Company had built its own private side track a distance of three and one-half miles to connect with the main line right-of-way of the Big Four Railway*, and certainly, under the provisions of Section 1 (9) of the Act, when a connection with the Big Four Railway was reasonably practicable and could be effected with safety, the Commission had authority to compel compliance with the Act. Likewise, if complainant here had built its track to connect directly with the right-

of-way of the Big Four at the northerly end of West 63rd Street in 1910 or any other time, the railroad, in the absence of a definite agreement or justifiable circumstances, would not be permitted to withdraw service to the siding at complainant's plant.

(k) On sheet 15 the third full paragraph is predicated upon a theory that there may be some question about complainant being a shipper. No such inference could be gleaned from the record. Complainant is certainly a shipper, but simply does not have a private side track so constructed as to be connected directly with the railroad right-of-way.

The statement that the Commission can require the operation of track 1619 for livestock upon reasonable terms, may be true, but the railroad defendants are at a loss to know how this could be accomplished. Unless this paragraph can be modified by specifying the manner in which the Commission believes the railroad defendants can carry out the order of the Commission, we believe this paragraph should be deleted.

Also, because of the misconception with reference to what
975 the parties concede in the third, fourth, and fifth lines from the bottom of this same paragraph, as to track 1619 being devoted to a public use, we believe the entire paragraph should be deleted. Assumptions are employed which are not supported in any manner by the record.

(l) On sheet 16, the Baltimore Butchers Livestock Company v. P. B. & W. Ry. Co., 20 I. C. C. 124, decided February 13, 1911, is discussed, and in the first full paragraph at the top of sheet 17 the following statement is made:

"Similar observations are warranted upon the facts of record here. *While the spur track in question there was owned entirely by the railroad, we do not consider this as having any legal significance in view of the operation and free maintenance of track 1619 here by the New York Central.*"

There is no justification for brushing aside or confusing the legal significance of the distinctions between the Baltimore Butchers Livestock Company case and the within complaint. The report shows that the Commission is aware of the fact that in the Baltimore case delivery of livestock to the industry's private sidetrack, which was connected directly with the carrier's main line track, and where there was no intervening private sidetrack or barrier such as exists in the within case, was arbitrarily discontinued by the railroad. The only reason for discontinuing the service was that the carrier and the Union Stock Yards had entered into an agreement in which the Stock Yards was designated as the exclusive point for delivery of all livestock entering Baltimore and the industry was compelled to accept delivery of livestock thereafter at the Union Stock Yards.

976 At page 137 of 20 I. C. C., the Commission said:

"the sole reason shown in the record for refusal on the part of the defendant to deliver livestock at complainant's yards was the alleged advantages to the general livestock market of Baltimore arising from the centralizing of the business, and the provisions in the contract with the Union Stock Yards Company in which it is agreed that the yard of that company should be the exclusive livestock depot."

In the instant case, there is not any similar contract. The railroad defendants are willing to deliver carload shipments of livestock to complainant's private sidetrack if the complainant will obtain from the Stock Yards Company permission to use the 1619 feet of Stock Yards track which intervenes between the New York Central's main tracks and complainant's industry or obtain its own direct connection.

The Baltimore Butchers Livestock case is not parallel with the instant case and all reference to it in the report should be deleted unless it is used as a contrast to the situation existing in the within controversy. In fact, the Commission should use the Baltimore case in support of a decision to dismiss the complaint in the within case.

(m) The second full paragraph on Sheet 17, giving the findings of the Commission, should be deleted, and the phraseology suggested for findings herein quoted in the last paragraph under Section V of this petition should be substituted therefor.

977 CONCLUSIONS

The main questions in this proceeding relate to (1) whether or not, in view of the long history and circumstances involved, the complainant is entitled to have the Commission order the railroad defendants or the New York Central to obtain for complainant, without cost to complainant, the use of the 1,619 feet of track owned by Stock Yards Company for delivery of livestock to complainant's plant, when said defendants have no ownership, control, or dominion over said track; (2) whether or not the Commission is empowered to issue such an order; (3) if so empowered, what steps can be taken to accomplish such results; (4) whether or not the Commission is empowered to exercise any such jurisdiction over the Stock Yards Company as will enable the Commission to compel the Stock Yards Company, which is not a common carrier, to extend the use of its 1,619 feet of track for the benefit of complainant, which the Stock Yards Company claims would be a financial detriment to its operations as a public stockyard. Stock Yards Company enjoys financial benefits from performing the services of unloading livestock through its stock

pens and yarding and storing the same, which benefits the Stock Yards would not enjoy if livestock is moved over its 1,619 feet of track to complainant's private sidetrack.

The decision of the Commission does not indicate by what authority it undertakes to require the New York Central to exercise a greater right in the 1,619 feet of Stock Yards track than it in law and fact possesses; nor does the order sufficiently enlighten the interested parties as to just what action could be taken to effectuate a solution of this controversy in keeping with the ideas of the Commission. The railroad defendants are left in a
978 dilemma as to just what should be done: They certainly cannot restore the service of delivering to complainant's private sidetrack complainant's interstate shipments of livestock consigned thereto and carried over railroad defendants' lines on or before August 30, 1946, by using the 1,619 feet of Stock Yards track; nor, are the railroad defendants able to establish and put in force, on or before August 30, 1946, a schedule or schedules providing for delivery to the sidetrack of complainant of its interstate shipments of livestock consigned thereto and carried over its lines, when said railroad defendants do not possess the right to use said 1,619 feet of Stock Yards track for such purpose. Moreover, said railroad defendants are prohibited by the owner of said 1,619 feet of track from so using it for complainant's benefit, or the benefit of any other shipper, in connection with shipments which are competitive with the business of said Stock Yards Company, except for compensation approximating charges for handling, storage and yardage which Stock Yards would collect if the livestock was unloaded through the Stock Yards pens.

In view of this impasse and the importance of this subject the Commission should reconsider its report and order and render a finding which is supported by facts and the principles of any applicable decisions. We urge this for the reason, among others, that it is apparent that the Commission omitted entirely, in its consideration of this novel controversy, any application whatsoever of the practices and customs prescribed by the Commission in Ex Parte 104. Certainly the Commission should avoid ordering any services which would be in violation of the practices prescribed in Ex Parte 104, or any other undue or unreasonable preferences or advantages.

979 In addition, the Commission should reconsider the omission from the decision of the cases of law which could possibly have any helpful bearing upon this controversy and the erroneous construction and application of the law contained in the report and order. The Commission has attempted to apply all of the more pertinent of the citations advanced by complainant, but its report does not reflect the principles announced in or the sig-

nificance of the more applicable decisions cited by railroad defendants. This is quite permissible, of course. However, the majority report gives quite a misleading impression as to the legal force of the railroad defendants' position and because of omitting any discussion of railroad defendants' citations of law there are indications that the Commission had put on "blinders" and "whizzed by" the law and argument presented by railroad defendants and placed strained construction on such law as was relied upon in the report in finding in favor of complainant. For instance, on sheets 9 and 10, the decision discusses Morgan Run Ry. Co. v. P. U. C., 120 N. E. 295, 98 O. S. 218, and the statement is made:

"The Supreme Court of Ohio had before it a situation closely analogous to that before us here."

and there follows an unsuccessful effort to fit the Morgan Run case into the controversy in this complaint. However, the statement is made in the Morgan Run case the short intermediate track was operated by the railroad under an agreement with the owner. The decision does not proceed to recite the fact that in the Morgan Run Ry. Co. case, the Burt heirs conveyed land to the Morgan Run Railway Company to construct, maintain, and operate a railroad or tracks, sidetracks, switches, etc., thereon and *the*

980 *Grantors reserved to themselves and their heirs and assigns, the same and equal opportunity and facilities for receiving and shipping of all kinds as are received by other persons, and the right to build a railroad or switch over the premises so conveyed to other premises owned by Grantors.*

John and Peter Ingham acquired the right of the Burt heirs in the land conveyed to the Morgan Run Railway Company and the agreement contained the above reservations. When the Inghams tried to sell their coal to parties other than R. B. Dennis (who was associated with the Morgan Run Coal and Mining Company and the Morgan Run Railway Company, which companies were owned by the same parties; and the same person was President of both Companies), at a higher price than Dennis would pay, the Morgan Run Railway Company refused to place cars for the Inghams, which was contrary to what it had been doing at the Ingham Mines when the coal was sold to Dennis. The Supreme Court simply held that as long as that Railway Company operates any portion of the railroad in question, it must do so without discrimination in favor of any shipper, including the Inghams.

Certainly this is not a situation parallel in any way to Swift's complaint. Where is there in this record any inkling of a contract which would entitle complainant to a perpetual right to use the 1,619 feet of track owned by the Stock Yards? Or, where is there

any such apparent collusion and discrimination as there was in the Morgan Run Ry. Co. case.

The Commission is not justified in laying such emphasis as it does upon the decision in the Morgan Run Ry. Co. case, an Ohio case which is not at all in point, and neglecting altogether
981 the illuminating decisions, including some of its own, advanced by defendants in their reply to exceptions of defendant dated September 25, 1945.

Failing to have such a contract as may have been present in the Morgan Run Ry. case, complainant then seeks to base its contention upon dedication to public use of the 1,619 feet of track owned by Stock Yards and the record fails miserably to support any ground of dedication to public service. The carefully guarded control retained by the Stock Yards over its 1,619 feet of track with complainant having full knowledge thereof at all times, certainly removes any basis for claiming dedication to public use.

The report and order of the Commission undertakes to apply the law in the following cases:

Guyton and Harrington Mule Co. vs. L. & N. R. Co., 50 I. C. C. 546, 550, on Sheet 7.

Union Lime Company vs. Chicago and N. W. Ry. Co., 233 U. S. 211, 221–222, on Sheet 9.

Morgan Run Ry. Co. vs. Public Utilities Commission, 120 N. E. 295, on Sheet 9.

Cleveland & etc. Ry. Co. vs. U. S. A., 275, U. S. 404, on Sheet 15; and

Baltimore Butchers' Livestock Co. vs. P. B. & W. R. R. Co., 20 I. C. C. 124, on Sheet 16.

Hereinbefore we have distinguished all of the above mentioned cases excepting the Union Lime Company case. The Union Lime Company case was a condemnation or eminent domain proceeding to obtain land for extending a private track under the provisions of Wisconsin Statute 1797–11M, which required every railroad to
982 acquire the necessary right of way and construct and operate a reasonably adequate and suitable spur track not more than three miles long etc. This case involved a state law and is not parallel with the within complaint because there is no comparable state law in Ohio. The only significance is that the Supreme Court said:

"While common carriers may not be compelled to make unreasonable outlays, it is competent for the state, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, *under reasonable conditions*."

Due to the fact that the decision is so definitely one-sided in its consideration of the law, a discussion of the applicable law which

ought to be determinative of this controversy is presented hereinbelow.

The report and order entirely ignores Limits Industrial Building Corp. et al. vs. B. & O. C. Terminal Co., 258 I. C. C. 438, discussed at page 27 of railroad defendants' Reply to Exceptions, dated September 25, 1945. The Commission in the Limits Industrial case found:

"Defendant's failure to continue freight service to and from an industry at Cicero, Ill., over certain switching and private industrial tracks previously constructed and in operation, and its refusal to operate over such tracks, under existing circumstances, not shown to be unlawful. Complaint dismissed."

The controversy in the Limits Industrial case and the decision in Greenlee Foundry Company vs. Borin Art Products Company, 379 Ill. 494, (which is part of the Limits Industrial case), is substantially similar to the within complaint. In the Limits Industrial case the B. & O. switch connected with the spur track of Limits under an agreement dated April 30, 1937 between the
983 B. & O. and Limits. Limits also regulated the right of use of its spur track by Borin Art Products Company. Limits owned that track beyond the B. & O. right-of-way. When the court enjoined the defendant, B. & O., from rendering any service over that track the complainant sought in the action before the I. C. C. to compel the rendering of the service. The B. & O. was willing to render such service if the legal obstacles were removed. At page 441 of the Limits case the Commission said:

"Common carrier services over private sidings and private industrial tracks cannot be expected, and certainly cannot be compelled, *where obstacles against the use thereof*, either legal or physical, *not caused by a carrier*, prevents it from entering upon those tracks. Nor is it within our jurisdiction to order a carrier, nor any other party, to take steps to remove such obstacles."

We are unable to understand why this case was not considered and discussed in the decision.

The Commission omitted any reference in its report and order to the court decision in the case of Bedford-Bowling Green Stone Co. vs. Oman et al., 134 Fed. 441, which was discussed at pages 34 and 43 in railroad defendants' Reply to Exceptions dated September 25, 1945. In that case (which was considered earlier in 115 Ky. 369, and was relied upon by complainant in its exceptions of August 1, 1945), the L. & N. Railroad sold its track which was built on the land of the Stone Company to the Stone Company and all rights which the railroad had in and to the track involved were terminated in that agreement. The court held that Oman, the third party who claimed he had the right to service

over the track owned by the railroad, had no property right or interest in any contract between the railroad company and
984 the owner of the land on which the track was located. That case, 134 Fed. 441, is interesting and gives the viewpoint of one court upon a situation which may be akin to the within case but is not urged as being analogous thereto.

Railroad defendants fully realize the unprecedented state of facts presented in the within case but believe that there is some reasonable guidance and help in the case of Sholl Bros. vs. Peoria & P. U. Ry. Co., 276 Ill. 267, 114 N. E. 529, which is based upon facts almost identical with the within complaint and which was discussed at length at pages 44–47 of railroad defendants' Reply to Exceptions of September 25, 1945. In that case Sholl Bros. in 1896 entered into a written agreement with the Peoria & Pekin Union Ry. Co. (hereinafter referred to as the Peoria) whereby the railway agreed to put in a sidetrack from its main track to Sholl Bros. coal mine about to be opened and operated by them. The contract between Sholl Bros. and the railroad provided that Sholl Bros. should furnish the right-of-way, grading and bridging from the main track to the mine, do all the grading and bridging necessary for the track at the mine and pay $300.00 as their portion of the first cost of the ties to be used in constructing such sidetrack. The railroad company agreed to furnish the balance of the track material and lay the sidetrack and necessary mine tracks and to maintain such tracks at its own expense, in return for which the railroad company was to have at all times exclusive use of said tracks and right-of-way. The railroad was also given the right to use said right-of-way and tracks in handling the business of or for the purpose of making connections with any other industry, *except coal mine*, that might thereafter be located adjacent to said right-of-way, provided said railway company:

"shall always do such other business in a manner which shall not interfere with Sholl Bros."

985 There were no industries other than the Sholl Bros. mine adjacent to, or reached by, this right-of-way at the time of its construction. However, before the track was laid a site for a state asylum for the insane had been chosen just beyond the land of Sholl Bros. and the asylum was established by the state on that site. The asylum commissioners built railway tracks on the asylum grounds and connected them with the track on Sholl Bros. land, after which the track on Sholl Bros. land was used for the transportation of freight to the asylum.

Sholl Bros. furnished coal to the asylum which was delivered over the track on its land and in some instances coal which was produced at some mine other than Sholl Bros. was delivered to the

asylum, but in each case of such delivery the Peoria requested and received the special permission of Sholl Bros. to move this latter coal over the Sholl Bros. track to the asylum. This practice continued uniformly until 1911 when Peoria issued a tariff showing a rate for the delivery of coal over Sholl Bros. tracks to the asylum and announced that such service was open to all persons who might demand it. Thereafter coal from the Wolschlag Copperative Coal Co. located on Peoria's railroad, was delivered over said t ack to the asylum. Whereupon Sholl Bros. filed court action and secured an injunction against the transportation over said track and right-of-way of coal not mined on their lands or under their coal rights.

In the trial Sholl Bros. contended that by the terms of the contract coal mines generally were excepted from the industries whose business the Peoria could handle over this track or make connections with, and that Peoria was precluded by the terms of the contract from transporting any coal over the track except
986. the coal from the mine of Sholl Bros. *The Court sustained this interpretation, not only upon the terms of the contract themselves, which the court found to be somewhat ambiguous, but mainly upon the construction of the parties themselves as shown by their acceptance, acts and other extrinsic circumstances.* The court affirmed judgment for Sholl Bros. upon the following grounds (p. 531):

"* * * *It must be remembered in this connection that the railway company does not own this right-of-way.* The fee in the land and right-of-way is owned by the defendants in error, *and the right of the railway company to use the tracks and right-of-way is restricted to whatever rights it has by the terms of the contract.*" [Italics ours.]

(p. 532):

"* * * *The sidetrack involved in this case is not a part of the public railway of plaintiff in error. It is connected with said railway, but not a part of it, and could not become a part of the railway system of plaintiff in error, unless* it be purchased or *acquired by condemnation proceedings.* As hereinbefore pointed out, the right-of-way on which the track was built is the private property of defendants in error, *and the right of the railway company therein is limited and governed by the provision of the contract that has been considered.*" [Italics ours.]

(p. 533):

"It would doubtless be of advantage to the state to be allowed to ship coal over this sidetrack to the asylum, but there is nothing in the circumstances of this case which gives the state any greater rights than an individual would have similarly situated."

Again in Fort Worth Stockyards Co. vs. Brown, 161 S. W.
987 (2d) 549, which was discussed at page 47 in railroad defendants' Reply to Exceptions dated September 25, 1945, the Stockyards Company sought to enjoin defendants from using its land. Stockyards had constructed an alley or driveway leading south from a public street to its pens. Defendants bought livestock from drivers on their way to plaintiff's pens, resulting in traffic congestion and loss of revenue to plaintiff. Defendants contended that the alley or driveway was a public thoroughfare and had been constantly so used by the general public with the knowledge and consent of plaintiff for more than thirty years. The injunction was denied and plaintiff appealed. The court said:

"Held: Defendants were never more than permittees. 'Granting to Defendants all the rights they may have acquired as such permittees on the premises, the permission given by Plaintiff, either expressed or implied, was subject to Plaintiff's revocation at its option,' p. 553. To create a prescriptive right the public use must be exclusive of the private uses of the owner. Use with permission of the owner will never ripen into prescription. Plaintiff's acquiescence in Defendant's use of its land would not preclude Plaintiff from determining who may and who may not transact business on its premises, this being true even though Plaintiff's business is of a public nature. Judgment for Plaintiff."

Railroad defendants are justified in feeling that in ignoring entirely the foregoing applicable law and other law cited and discussed in railroad defendant's Reply to Exceptions dated September 25, 1945, that the CCommission has not accorded this subject the fair treatment it deserves.

Railroad defendants also feel that the law pertaining to
988 to dedication to a public use, recited in the Reply to Exceptions dated September 25, 1945, beginning at page 49, and particularly the cases beginning with Irwin vs. Dixon, et al., 9 Howard (U. S.) 10, 13 L. ed, 25, on page 53 thereof, and continuing through to and including the case of Rochex & Rochex vs. Southern Pacific R. Co., 128 Calif. App. 474, 17 P. (2d) 794 (1932) at page 68, should have been considered and discussed. Particularly do we suggest that the report and order embrace a discussion of the law of dedication to public use because on sheet 3 the Commission inconsistently and incorrectly says:

"Portions of the spur from the main line to complainant's siding were dedicated to public use by various easements conveyed to the railroad by the Stock Yards, complainant, and others."

While it is true that two hearings have been held and this subject has been argued before the Commission twice, it is also true that the examiners who conducted both hearings unanimously proposed reports which correctly portrayed the facts and circumstances involved and made proper recommendations to dismiss the complaint based upon such applicable law as was available and the circumstances involved.

Also, we are still mindful of the statement made by complainant on page 35 of its Exceptions to Report proposed by Paul O. Carter, Examiner, dated April 30, 1943, reading as folows:

"We have searched the decisions of the Commission without finding a case involving a state of facts exactly similar."

We believe that statement is correct; it is just as correct today as the day complainant's counsel uttered it, and in view of the
989 erroneous analysis of the law made in the report and order and the unwarranted and unsupported assumptions used as a basis for discussing this novel question which is of such an important nature, certainly a reconsideration, reargument and modification of the report and order is warranted.

We submit that there is no provision in the term "railroad" contained in Section 1 (3) (a) of the Interstate Commerce Act to the effect that private property used by one carrier under contract for limited purposes thereby becomes a railroad for unlimited use without agreement, condemnation or dedication.

Complainant cannot in good faith claim that any tariff provision misled it in connection with the limited use of the 1,619 feet of track owned by the Stock Yards Company under the provisions of Section 1 (6) of the Act, nor has complainant produced any facts or history of any kind which indicate a violation of Section 1 (9) of the Act. In fact, complainant has not shown that it has constructed a sidetrack to connect with railroad defendants' railroad as the term "railroad" is defined in the Act. Complainant is simply seeking to obtain an undue and unreasonable preference and advantage which is not accorded or required to be accorded to other shippers.

Wherefore, said railroad defendants pray that the Commission stay the effective date of the order until the further order of the Commission, pending the decision of the Commission with respect to this petition; that said proceeding be reopened for reconsideration, and reargument upon the record before the Commission; and that, after such reconsideration, the complaint be dismissed or the
findings in the report and order of May 3, 1946, be modified
990 as hereinabove requested; and that such other report and findings be made as the Commission may consider proper in the premises.

Oral argument is respectfully requested.
Respectfully submitted.

HAROLD H. MCLEAN,
LEO P. DAY,
KEMPER A. DOBBINS,
M. B. & H. H. JOHNSON,
WILLIS T. PIERSON,
DWIGHT B. BUSS,
G. H. P. LACEY,
ROBERT R. PIERCE,
Counsel for Railroad Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing petition upon all parties of record in this proceeding by mailing by first class mail a copy thereof to each party.

Dated at Cleveland, Ohio, this 2nd day of August 1946.

ROBERT R. PIERCE,
1324 West Third St., Cleveland 13, Ohio,
Of Counsel for Railroad Defendants.

994 Before the Interstate Commerce Commission

Dkt. No. 28714

SWIFT & COMPANY
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

Complainant's answer to railroad defendants' petition for reconsideration, reargument, and modification of findings

INTRODUCTORY STATEMENT

Because of the repetitious method adopted in preparing the petition, it is difficult to reply in an orderly and logical manner. We gain the impression that everything in the decision, with the exception of the caption, is wrong. To use the exact language of the petition (p. 35, first par.) "the Commission had put on blinders and 'whizzed by' the law." We participated in the argument in this case, have appeared in several others, and have not yet
995 had the unusual experience of watching this sequence. We should enjoy being present with a fast camera.

We do gather that (in the opinion of counsel for defendants) this decision, which effects a simple act of justice, will have amazing and as yet immeasurable results. Perhaps it is hardly

overstating the general tenor of the petition to say that (in the opinion of counsel for defendants) this decision is probably causing the present difficulties in the Peace Conference, may seriously dislocate the efforts of the United Nations, result in devastation akin to that of the atomic bomb, and at the least wreak punishment upon an "innocent and helpless victim" (Petition, p. 15).

In the reply that follows we have discussed certain of the major points conjured up by defendants. Each one of these contentions is mentioned initially on some page of the petition and then repeated disconnectedly at other places throughout the petition. We consider that a single answer on each of these points is adequate and therefore shall not follow the style of the petition by repeatedly saying the same thing. We indulge the assumption (apparently not shared by defendants), that a single statement of a proposition is sufficient for the Commission.

THE PETITION RAISES A DOUBT AS TO WHAT IS BEING TRIED IN THIS CASE

We believe it is a moderate statement to say that the language used in defendants' petition goes beyond traditional bounds. We summarize a few of the statements made.

996 "Our amazement is further increased," say petitioners, because the Commission overruled the reports proposed by the tree different Examiners. The Commission "assumes facts," say defendants on page 3 of their petition, and "completely and unjustifiably ignores the facts and applicable decisions." On the same page defendants say that the conclusions are "unsupported by any evidence in the record or any applicable law or any fair interpretation thereof." The Commission, according to defendants (page 5, paragraph (12)), "strained throughout its report to nullify and circumvent" a certain fact. According to defendants (page 9, paragraph 3), the report is based upon "contradictions and inconsistencies." At page 11, paragraph 2 we find that the decision was based upon "uncertainty and doubt" in the minds of the Commission. Similarly in the last paragraph on page 12 defendants state that certain findings of the Commission are "misleading, unrealistic." According to the petition (at page 16) the Commission adopted an "unrealistic and confused approach to the facts" and "strains to give it (a certain fact) no effect." According to the petition (on the same page) the Commission "misstated facts." Again at the bottom of page 19 we are told that the Commission "strains" to reach a certain conclusion. The petition informs us (page 35, first paragraph) that "the Commission had put on 'blinders' and 'whizzed by' the law" in reaching its decision.

Perhaps the phrases so far quoted and other similar lan-
997 guage may be condoned as merely an overzealous statement by counsel; but the following paragraph (quoted from page 13 of the petition) appears to be a direct attack upon the intellectual integrity of the Commission:

"When the issue in any case is not stated in an impartial and complete manner, it is practically a foregone conclusion that the ruling on the issue will be erroneous—as it proves to be in this case. We respectfully submit that the manner in which the issue in this case is stated at the outset, on Sheet 7, in and of itself condemns this report. It does not state the true issue at all, but apparently reflects a fancied determination to spell out a case for complainant."

The innuendo is plain.

Of course, there is no fair ground of attack upon a decision (see petition, p. 2) that the Commission failed to agree with the reports of the Examiners who heard the case. That often happens and is the very reason why exceptions and argument based upon the proposed report of the Examiners are a part of the Commission's procedure.

THIS CASE HAS HAD AN UNUSUAL DEGREE OF ATTENTION BY THIS COMMISSION

The history of this case shows that it has had very thorough consideration by the Commission. It is unlikely that the errors alleged crept into it, that the Commission has put on "blinders," or that it has misstated any essential fact.

The complaint was filed in September 1941. It came
998 on for hearing at Cleveland, Ohio, April 22, 1942 before Examiner Paul O. Carter. A proposed report was issued by Examiner Carter in April, 1943. Oral argument was had before the entire Commission on June 4, 1943. By order of the Commission (on its own motion) of June 14, 1943, the case was reopened for further hearing and was heard at Cleveland, Ohio, on June 22, 1944, before Examiner T. Leo Haden. Further briefs were filed in October 1944. In May 1945, a proposed report was issued by the Examiners. Exceptions to this report were filed by the complainant on August 1, 1945. The case was again argued before the entire Commission on October 3, 1945. The case was not decided by the Commission until May 3, 1946. Thus, seven months intervened between the second oral argument and the decision.

A further fact not without importance in this connection is that there was a division of opinion in the Commission. Six commissioners concurred in the majority opinion, three dissented, and one

commissioner did not participate. It is only fair to deduce that, where two separate proposed reports have been made by different Examiners, where there have been two oral arguments before the entire Commission, and where there is a division of opinion in the Commission, the case must have been considered very seriously after its submission upon oral argument. It is not likely under such circumstances that erroneous statements of fact crept into the majority decision, that the issues were stated in a partial
999. or incomplete manner, that the true issue was not stated at all, or that the majority opinion reflected a "fancied determination to spell out" a certain conclusion. The dissenting opinions are not based upon any such innuendo concerning the good faith and integrity of the majority, but solely upon different conclusions on questions of law, a kind of division which frequently occurs in such a high tribunal as the United States Supreme Court.

There is a tradition that Abraham Lincoln said that every lawyer who lost a case had a right to "cuss the Court" but that this should be done at the tavern in the evening. Here it seems doubtful whether defendants are trying the case or trying the Commission.

THE FUNDAMENTAL PROVISIONS OF LAW UPON WHICH THE DECISION RESTS ARE NOT DISCUSSED IN THE PETITION

In the 46 pages of printed matter contained in the petition the defendants do not discuss the single provision of law which is fundamental in this case and upon which the decision of the Commission rests. We refer to the definition of the word "railroad" in section 1 (3) (a) of the act, the pertinent portion of which is quoted in the second paragraph on sheet 2 of the mimeographed copy of the decision. Section 1 (3) (a) provides that the term "railroad" shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind." etc. The
1000 same section further defines "transportation" as including "all instrumentalities and facilities of shipment or carriage irrespective of ownership, or of any contract, express or implied, for the use thereof," etc.

The evidence shows and the Commission finds that track 1619 has been operated by the New York Central for more than thirty years. As we understand the record (see decision sheet 3, second paragraph) the track was laid by the railroad without compensation by the yards. The statute makes no distinction as to whether the track is owned in fee by the railroad or operated under a contract, agreement, or lease. Certainly it cannot be denied that track 1619 has been operated by the New York Central

under a contract, agreement, or lease since 1910. All of the contracts and agreements under which the railroad has operated the track are a part of the record and are summarized in the decision. This being so, track 1619 became a part of the railroad under section 1 (3) (a) and it thereupon became the duty of the New York Central to operate this part of its railroad as well as all other parts in conformity with the terms of the Interstate Commerce Act. The New York Central could not in respect to this part of its railroad indulge in preferences, discriminations, concessions, or other violations of law, any more than in connection with its main line spur tracks owned in fee.

It is strange that this provision of law and the Commission's findings thereunder should not have been discussed in the
1001 petition for rehearing. It is fundamental and all other conclusions in the decision stem from it. If the Commission was correct in finding that track 1619 became a part of the New York Central Railroad and of its terminal facilities, then no other part of the decision is open to debate. If the Commission erred in that connection, the complaint should have been dismissed. Yet this specific point is not argued in the petition.

THE QUESTION OF DISCRIMINATION NECESSARILY DEPENDS UPON THE LEGAL CONCLUSIONS UNDER SECTION 1 (3) (A)

In refusing to deliver carloads of livestock to the Swift plant while contemporaneously making deliveries to the private sidetracks of complainant's competitors, Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, the Commission held that the railroad defendants were violating the antidiscrimination provisions of section 3 (1) of the act.

This finding of the Commission is alleged to be erroneous in section IV of the petition, page 16, and at other places throughout the petition. It necessarily follows that this finding as to discrimination was correct if the Commission was correct in finding that track 1619 had become a part of the New York Central Cleveland terminals under section 1 (3) (a) of the act. The evidence that carload shipments of livestock were being deliverd to the sidetracks of the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company was not disputed.

But the railroad attempts to justify that delivery upon the
1002 ground that each of said industries has a sidetrack connecting directly with the New York Central main line, no part of which is owned by the stockyards. When, however, the Commission holds as it rightfully did that track 1619 has also become a part of the New York Central Railroad and of its terminal system by reason of the operation of that track under contract, agreement,

or lease by the New York Central for over thirty years, then the position of the Swift plant becomes exactly the same as that of the three other plants mentioned. Each is located upon a sidetrack of the New York Central and the situation is such that each is entitled to the same service as each of the others with respect to delivery of livestock or any other freight. The three deliveries to complainant's competitors can no longer be distinguished from the delivery to the Swift plant because the history of the track and the provisions of the law have made track 1619 a part of the New York terminal system in connection with which it may not discriminate to the damage of one plant and in favor of three others engaged in the same business located upon the terminal tracks of the same railroad and in all other respects entitled to equal treatment.

THE MYTH OF EX PARTE 104

For the first time in this proceeding, and after it has been before the Commission nearly five years, the defendants raise the point (page 3, paragraphs 2 and 3 and at other pages in the petition) that the order of the Commission in this case would bring about

1003 a violation of the principles announced in Propriety of Operating Practices—Terminal Services, 209 I. C. C. 11, and the decision of the Supreme Court which sustained the decision of the Commission in United States v. American S. & T. Plate Co., 301 U. S. 802, 81 L. ed. 1186.

Counsel must have been hard pressed to find some ground for asking reopening in order to reach the point where they were willing to make these categorical statements concerning Ex Parte 104. If there has been any possibility that granting the prayer of the complaint would have involved a violation of the principles there stated, there were two hearings and two oral arguments before the entire Commission in which this issue could have been raised, and yet we find it first stated in a petition for reconsideration after the final decision of the case.

The fallacy of defendants' assertion, however, does not rest upon the mere lack of diligence of counsel in presenting the issue. As applied to the situation at Cleveland, the statements in defendants' petition are purely a myth.

The Commission well knows that the original decision in Ex Parte 104, and the later decisions therein dealing with specific industries had to do, almost without exception, with cases where industries had an immense track layout within their plant and where cars were delivered to or received from the industry upon an interchange track. In almost all such instances the cars were placed upon the interchange track by the railroad and switched

from such interchange track to the desired point within the
1004 industry by motive power owned by the industry; and generally the railroad made an allowance to the industry for this switching by the industry within its plant and beyond the interchange track.

No such situation exists at the Swift plant at Cleveland. The Swift plant at Cleveland has no tracks which are literally within the plant. It owns no engine with which it performs switching for the plant or otherwise. Reference to Exhibits 12 and 13 of the record in this case shows a very simple track lay-out, with one track running to the rear of the Swift plant and another parallel track which at times serves the Swift plant, but also, under an easement granted by Swift, is used to serve plants to the north of the Swift plant, including Hughes Provision Company, Kohlberger Company, and Theurer-Norton Provision Company. Only a limited number of cars can be accommodated upon the sidetracks adjacent to the Swift plant. The switching service is performed in all instances by a simple switch movement at the carrier's convenience. These facts are also known to the Examiners by reason of a visual inspection of the track lay-out, made by them in company with counsel for defendants, upon invitation of complainant.

The plain fact is that, if any Ex Parte 104 situation is brought about by the order in this case, it already existed with respect to all dead freight switched to the Swift plant and with respect to all dead freight switched to the seven other industries served by track
1619; with respect to the three packing companies located
1005 north of the stockyards, and indeed with respect to all other industries in Cleveland which do not perform their own internal switching service but have simple sidetrack deliveries.

But finally, this assertion on the part of defendants indicates an almost incredible lack of knowledge as to what has actually happened in this connection. The defendant carriers filed with the Commission, effective November 1, 1945, a tariff known as W. S. Curlett, I. C. C. No. A–833. This tariff was suspended for a period but became effective January 1, 1946. The purpose of the tariff was to publish the general rules respecting deliveries which had been announced by the Commission in the various Ex Parte 104 decisions. This tariff applies at all points throughout official classification territory, including Cleveland. It is understood that it had the informal approval of the Commission as being appropriately phrased for the purpose of giving effect generally to the Commission's decisions under Ex Parte 104. This tariff applies to every sidetrack delivery of every carload of freight in the city of Cleveland, including all deliveries to complainant's plant, whether it be dead freight or livestock. It cannot be denied that, regard-

less of the fact that the deliveries to the Swift plant did not present any situation coming within Ex Parte 104, nevertheless, if in the imagination of defendants' counsel such a situation could have existed, it was ended by publication of the tariff to which we have referred.

1006 The fact that this tariff was published and has been applicable at Cleveland since January 1, 1946, is not mentioned in that part of defendants' petition relating to Ex Parte 104 or elsewhere.

This tariff provides, amongst other things, that cars shall be delivered at carriers' ordinary operating convenience in a continuous movement; provides a charge of $1.00 for each five minutes in excess of thirty minutes where the locomotive is delayed in placing cars through fault of the shipper; and where delivery is delayed because the car is placed on a hold track the subsequent movement of the car for delivery to the industry track will be subject to a charge of $3.47 per car. The recent decision in the Corn Products Refining Co. case (decided July 1, 1946, not yet reported), shows that the Commission considered that said tariff gave effect to the principles of Ex Parte 104.

It is perhaps an understatement, under these circumstances, to say that we admire the audacity of our opponents in raising the point after the situation had been covered by an effective tariff applicable to the Swift plant and all other plants at Cleveland prior to the decision in this case.

THE NEW YORK CENTRAL IS NOT WITHOUT POWER TO OBEY THE ORDER

On page 6 of the petition and at many other points therein it is stated in effect that the New York Central cannot comply with the order.

1007 A short answer to this proposition might be that all the New York Central needs to do is to add a carload of livestock to the other cars which are being moved over track 1619 in a particular switch movement and deliver it at the Swift plant. It is certainly no more difficult to do this than to deliver a car of salt, lumber, or coal.

The New York Central, however, apparently bases this argument upon the proposition that the stockyards may refuse to permit the New York Central to move the car of livestock over track 1619. Let us anticipate what might then happen.

The stockyards company was made a defendant in this proceeding under section 2 of the Elkins Act, 49 U. S. C. A. Sec. 42. This fact is stated in the last paragraph on sheet 2 of the mimeographed copy of the decision and section 42 is quoted in the footnote. The Commission holds that under the conditions here presented the

stockyards is a proper party defendant in this proceeding under said section. Let it be noted also that the order of the Commission attached to the decision runs not only against the New York Central Railroad and the other railroad defendants but also against The Cleveland Union Stock Yards Company.

We question whether the stockyard company under these conditions will be advised by competent counsel to take the risk of disobeying the order of the Commission.

This order is made under section 15 of the Interstate Commerce Act. Section 16 (8) provides that for a violation of an
1008 order made under section 15 any officer or agent of the *carrier who knowingly fails and neglects to obey such order* shall forfeit to the United States the sum of $5,000 for each offense, that every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

It may be argued that this penalty would run against the railroad only and would not compel action on the part of the stockyards because the stockyards is not a carrier or the agent of a carrier. We believe the stockyards is an agent of the carrier in connection with the loading and unloading of livestock. But that point is immaterial in this connection. 18 U. S. C. A. 550 reads as follows:

"(Criminal Code, section 332.) 'Principals' defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal. (R. S. § § 5323, 5427; Mar. 4, 1909, c. 321, § 332, 35 Stat. 1152.)"

Under this provision of the criminal code, if the stockyards should aid, abet, or induce a violation of the order, it would become a principal and would be subject to the same penalty as the railroad for violation of an order. Indeed, this very section of the criminal code has been used by the Commission in many prosecutions, especially under the Motor Carrier Act, in order to bring in as defendants and obtain the imposition of penalties upon parties who were not carriers. Thus, we see that the New York Central may comply with the order merely by pulling a carload
of livestock to the Swift plant along with a carload of
1009 lumber; and that, if the stockyards should attempt to prevent such action by the New York Central, under compulsion of an order of the Commission, the stockyards would be liable for severe penalties.

If either the New York Central or the stockyards believes that the Commission has committed an error of law in the conclusion stated in its decision, and in the entry of the order, they have a remedy which involves no penalty. The parties defendant may

file in the proper United States District Court a petition seeking to have the order enjoined and, in the event such petition should be denied by the District Court, an appeal lies direct to the United States Supreme Court.

It is believed that what has been said is a sufficient answer to the statements made so often throughout the petition to the effect that the New York Central is unable to comply with the order entered in this case.

THE PROPOSITION THAT DEFENDANTS SHOULD BE PERMITTED TO VIOLATE THE INTERSTATE COMMERCE ACT BECAUSE COMPLAINANT FORMERLY OWNED 9⅓% OF THE STOCK OF THE CLEVELAND UNION STOCK YARDS

Defendants seem earnestly to contend (petition, page 4, paragraph 5) that Swift is not entitled to the reasonable services, rates, deliveries, etc., required by law and that the New York Central may violate its present tariff[1] with respect to deliveries to the Swift plant, because in the language of the petition the decision "ignores entirely the uncontradicted early history and circumstances, including the history of the relationship between the complainant and the stock yards company."

The proposition is on its face preposterous but, since it is made, we reply.

1. The cases cited by defendants are not in point. Swift & Company v. Alton R. Co., 238 I. C. C. 179, and Swift & Company v. United States, 316 U. S. 216, 86 L. ed. 1391, involved no question as to whether a railroad carrier might violate its published schedule or refuse customary deliveries on industry sidetracks. The only question involved in those cases was whether the consignee of carloads of livestock shipped to a public stockyards, after unloading from the railroad cars into the pens of the public stockyards, could demand egress from the stockyards' pens over the property of the stockyards without payment of yardage charges to the stockyards. The court held that the consignee could not avoid payment of the yardage charges. The same conclusion was reached as to deliveries of livestock consigned to the Cleveland Union Stock Yards in Baltimore & O. R. Co. v. Cleveland Union Stock Yards Co., 255 I. C. C. 579. This conclusion was not upon the ground suggested by defendants but solely upon the ground of jurisdiction. The Commission said (page 592):

"Upon the facts of the record, we find that the services performed in the past by the Stockyards Company and
1011 now performed by the Service Company, and the facilities

[1] The Commission finds, sheet 6, mimeographed report: "No similar cancellation was made, however, as to rates on shipments of livestock billed to complainant's siding for movement in line-haul service over the New York Central to Cleveland. On such traffic the tariffs of that carrier provided, and still provide, for delivery to complainant's siding at the line-haul rates to Cleveland."

furnished, beyond the unloading pens, are services and facilities which are not subject to our jurisdiction."

In the present case we are dealing with railroad facilities over which the Commission has exclusive jurisdiction and not with pens of public stockyards over which the Commission has disclaimed jurisdiction.

2. The petition states, page 4, paragraph (5), that the decision "ignores entirely" the former relationship between complainant and the stockyards. The shocking error in this statement is apparent when it is noted that an entire paragraph of the decision (second paragraph, sheet 7, mimeographed copy) is devoted to relating the pertinent facts in this connection. It can hardly be argued that the Commission has ignored entirely, fractionally, or in any other degree, facts which it has stated in its decision. If the facts need be stated more fully than they are in the decision, which we doubt, they appear at page 238 of the transcript as follows:

"At the request of counsel for defendants, the following stipulation was agreed to and filed of record as exhibit 49 (t. 238):

'Stipulation.

'Testimony of Mr. Pearson F. Marsh, Special Agent of the Interstate Commerce Commission, in Ex Parte No. 127 hearing, July, 1939, in which he stated (R. 824–825, Ex Parte 127):

"In 1916, Swift & Company purchased 1,000 shares of $100 par stock (voting) of The Cleveland Union Stock Yards
1012 Company for $100,000. In 1922, Swift & Company received a stock dividend of 60 per cent—an additional 600 shares. In 1924, Swift & Company sold 300 shares after which its holdings were 1,300 shares or approximately 6½ per cent of the total 200,000 shares then outstanding. In 1928, in connection with the reorganization of The Cleveland Union Stock Yards Company, Swift & Company turned in its 1,300 $100 par shares and received in exchange 5,200 shares of new no-par stock. In 1933, Swift & Company sold 237 shares, and in March 1936, sold its remaining interest of 4,963 shares. Since that date, Swift & Company has had no interest in The Cleveland Union Stock Yards Company."

'Swift & Company disposed of its shareholdings pursuant to an order dated February 27, 1920, issued by the Supreme Court of the District of Columbia in Equity Case 37623, entitled United States of America, petitioner, v. Swift & Company, et al., defendants. On January 31, 1931, Swift & Company was ordered to divest itself of ownership in public stockyard market companies and stockyard terminal railroads on or before January 31, 1932, and

asked for an extension of time in which to dispose of its interest and by an entry filed in this Equity Case No. 37623, on February 8, 1936, Swift & Company reported disposing of 4,963 shares of the capital stock of the Cleveland Union Stock Yards Company to John DeWitt, which sale was confirmed.'"

It will be noted that the statement in the Commission's decision is merely a short statement of the facts of record.

1013 Thus it appears, and the Commission finds, that for a period of years Swift owned about 6½ per cent of the stock of the Cleveland Union Stock Yards. It could not even be suggested that such a minority holding of stock in that company was unlawful. But aside from that, let us examine for a moment the novel and irrational propositions involved in this contention of defendants:

(a) Swift once owned 6½ per cent of the stock of the Cleveland Union Stock Yards.

(b) The New York Central publishes a rate of 89 cents cwt. on fresh meats in carloads from Chicago to New York.

(c) For the reason stated in (a) the New York Central may charge Swift 10 cents per hundred pounds or any other amount above its published tariff rate.

(d) The New York Central may refuse to accept a car of meat from Swift at its sidetrack in Chicago and refuse to deliver a car upon a Swift sidetrack in New York.

(e) Swift is not entitled to equal treatment with other shippers in Cleveland or elsewhere.

(f) The New York Central need not accept a carload of live stock at Indianapolis for delivery at the Swift plant in Cleveland, in violation of its published tariff.

The logical end of the argument of defendants would be that anyone who had ever held stock in a corporation *ipso facto* and forever after is denied all protection under the civil and criminal laws of the United States. Surely we need not discuss such a legal mirage.

1014 GENERAL STATEMENT AS TO FORM OF REPLY

We believe that under specified title headings we have given a complete reply to the principal criticism offered by defendants in their petition. It is difficult to answer the petition in an orderly manner because substantially the same allegations of error are intermingled throughout the entire petition and as a result are often stated four or five times; whereas we believe logical presentation would have required that each alleged error be stated once together with reference to the facts of record or to the law which supports it. Since this form of presentation has not been

followed in the petition, we find ourselves in this position. We do not desire to repeat in this reply what has been said as to the principal points urged by defendants in connection with each of the pages of the petition on which a statement is repeated. On the other hand, we do not wish that silence be treated as an admission or acquiescence where a point is repetitiously stated. Therefore, in addition to the specific points under the several prior headings herein, we refer briefly to various repetitious statements.

VARIOUS STATEMENTS IN DEFENDANTS' PETITION

Defendants state (at page 5) that complainant is now asserting that track 1619 is a public spur in which complainant has acquired a vested interest. The exact contrary is true. Swift has and asserts no interest in the track, vested or otherwise.
1015 The New York Central, however, has gained an interest in the track because it has been operated as a part of the New York Central terminal system for many years under a contract, agreement, or lease, and has become a part of its terminal facilities in Cleveland which are subject to the provisions of law.

Petitioners state that the Commission lacks the power to subject the property of the stockyards to use for the benefit of complainant or the railroad. The short answer to this proposition is that the Commission is doing nothing of the kind. The track in question has been devoted to the use of the railroad over many years by voluntary agreement between the railroad and the owner and not by compulsion of any public power.

Petitioners urge in the paragraph commencing at the bottom of page 5 of the petition that the Commission is inconsistent in acknowledging that the yards company may withdraw its tracks from use altogether but cannot lawfully limit its use, a proposition which, say defendants, "flies in the teeth of common sense." There is nothing novel about this proposition. Many small railroads have been abandoned in toto because they could not earn operating expenses, but so long as they are operated they have to conform to the terms of existing law. A complete answer to this argument is found in Ayres Mercantile Co. v. Union Pacific R. Co., 16 F. (2nd) 395, quoted at p. 80 of our exceptions dated August 1, 1945.

So many similar illustrations could be cited that we will
1016 suggest only one more. A man might grant an easement over his land for the purpose of erecting telephone poles and stringing wires thereon, and perhaps at a later time cancel and withdraw the easement. Nevertheless, while he permitted the use of his land to carry the wires of the telephone company, he

could not say to the telephone company that it shall not put a telephone in the home of one John Smith or that Smith must pay for the easement granted the public utility.

Two paragraphs on page 6 of the petition are devoted to a contention that the order in this case cannot be carried into effect. That point has already been covered. See page 13 herein.

The contention as to lack of ownership, dominion, or control over track 1619 stated at the bottom of page 8 of the petition is answered herein in the chapter commencing on page 6 herein.

The defendants say (second paragraph, page 9) that the order in this case would cause undue and unreasonable preferences and advantage to complainant which are not afforded to shippers generally and would supply a superior service to complainant not accorded to shippers generally. For transparent reasons defendants do not elaborate on this point or state any facts to support it. Under the order the complainant would receive only the same kind of delivery of carload shipments of livestock that is accorded by the New York Central to three of complainant's competitors not
1017 more than three city blocks from its plant, the same service and delivery of carloads of livestock that under defendants' tariffs are open to any other shipper in the Cleveland district; and the same type of service that under defendants' tariffs is accorded to all dead freight reaching the city of Cleveland, whether consigned to the plant of complainant, to another plant in the stockyards district, or to any other industry within the Cleveland switching limits.

We find the difficulty of compliance with the order repeated in various forms on pages 10–12 of the petition, but it is unnecessary to advert again to that proposition.

The petition states on page 13, first paragraph, that the Commission has stated the issue "in a manner which begs the question and makes the answer in complainant's favor a foregone conclusion." No comment upon this criticism of the Commission is necessary.

In the last paragraph on page 14 of the petition the railroads again advert to the former ownership by Swift of the small block of stock of the Cleveland Union Stock Yards. While this point is without merit, it has been answered in the chapter at page 16 herein.

The defendants urge (page 15 of the petition, second paragraph) that the New York Central should not be "penalized" and should not become "an innocent and helpless victim" of this contest between the complainant and the stockyards company. It is difficult to imagine how the New York Central would be penalized.
1018 It is ordered to give the ordinary sidetrack delivery that it now provides upon all classes of dead freight in Cleveland to all industries and upon livestock itself to all industries other

than that of complainant. For these services, under the reciprocal switching agreement, it is assumed that the New York Central and the other lines are compensated in the rates to Cleveland.

As to the suggestion, if it is intended, that the New York Central is entirely at the mercy of the stockyards, that point is fully covered in the decision of the Commission commencing with the last paragraph on sheet 11 of the mimeographed copy and continuing to the end of the third paragraph on sheet 12. The Commission reaches the conclusion that penalty charges may not lawfully be assessed by the stockyards against the railroad. Unless some court should later hold otherwise, it is obvious that the New York Central is not penalized and does not become an "innocent and helpless victim," nor even a refugee either from the standpoint of the services rendered or by any charges that may be imposed upon it.

The petition states in section IV, page 16, that the finding of the Commission of a violation of section 3 (1) is based upon "misstated facts." This proposition has already been answered herein on page 3 and we will not restate what was there said. It may be noted, however, that none of the decisions cited by defendants on page 19 of their petition supports the proposition here urged by them. Defendants apparently have not yet heard of the
1019 provisions of law enacted in 1887 to the effect that shippers similarly situated shall be given similar and equal treatment. That is the rule which the Commission proposes to enforce. None of the cited decisions violates this principle.

The defendants assert (petition, pages 20, 22) that the Commission has "assumed certain facts" which are "absolutely at variance with the record and therefore reached erroneous conclusions." It is very unlikely that this could have happened in a case which has had the extended consideration mentioned at page 4 herein. The facts stated in the majority report are exactly those stated in the reports of the Examiners with which the defendants appear to be entirely satisfied. If those facts are at variance with the facts of record (and they are not), that point should have been called to the attention of the Commission by exceptions to the proposed report of the Examiners. To save time we merely point out that the alleged facts set forth in paragraph (1) on page 20 of the petition appear fully in the third and fourth paragraphs, sheet 4, and on sheet 13 of the mimeographed copy of the decision.

With respect to paragraph (2) page 20, there is no finding in the decision of any collusion between the complainant and the stockyards company and none could have been made.

With respect to paragraph (3), same page, the Commission has pointed out (sheets 11–12) that the stockyards may not exact a penalty from the New York Central.

1020 It is suggested in paragraph (4), page 20, of the petition that the decision is intended to afford complainant an opportunity to build additional unloading chutes and facilities which have not been in existence in the past. The situation in this respect is fully summarized in the second paragraph on sheet 5 of the decision. So far as complainant is concerned, nothing could have been more idiotic than spending its money in the building of additional unloading pens during a period when it was denied the right to have livestock delivered at such pens. Again in paragraphs (5), (6), (7), and (8) it is stated that the decision would result in undue preferences and advantages to complainant. We have already pointed out that the order would result in giving complainant only the same service that is accorded to all other receivers of livestock and all other receivers of dead freight in the city of Cleveland and, therefore, do not elaborate further on that point.

We may pass by without comment the statements under section VI on pages 22–29, inclusive, because they are mere categorical declarations not supported by anything in the record, or the decided cases, and it would make no difference in the conclusion if certain of the slight changes in findings there suggested were inserted in the decision. We deny, however, that the suggested changes are warranted.

Coming to page 29 defendants state that reference to the decision in Guyton & Harrington Mule Co. v. L. & N. R. R. Co., 50
1021 I. C. C. 546, should be deleted because it has no similarity to the present case. The holding in that case which was relied upon by the Commission was that so long as a carrier by tariff provides for a specific delivery, it must make that delivery. The Commission has found (see page 16 herein) that the New York Central tariff still provides for the delivery here sought. Certainly, in this respect the Guyton & Harrington Mule case is not only in point but is controlling.

The next suggestion of defendants (page 29) is that the Commission delete from its report all of the matter commencing with the second full paragraph on sheet 9 and extending to the end of sheet 14. Such a suggestion needs hardly any comment. If controlling facts and a discussion of the law are to be taken out of a decision, preparation of a decision is a mere futility.

Defendants also state on pages 29 and 30 that the Commission should withdraw its reference to the decisions in United States v. B. & O. S. W. R. R. Co., 226 U. S. 14, 57 L. ed. 104, and Cleveland, etc., Co. v. United States, 275 U. S. 404, 72 L. ed. 338. Those decisions are used merely to state the power conferred upon the Commission by section 1 (9). They are therefore relevant in a decision dealing with the powers of the Commission under that section.

Defendants make an assertion on page 30 of their petition which we had hardly expected from the learned counsel who tried this case and wrote the petition. It is in the second paragraph and reads as follows:

"Complainant * * * does not have a private side
1022 track so constructed as to be connected directly with the railroad right-of-way."

This is a plain misstatement of fact. Exhibits 12 and 13 show that complainant's sidetrack *connects directly with tracks of the New York Central*, not with the stock yards track.

In the first paragraph on sheet 3 of the decision the Commission points out (and correctly) that the initial 132 feet of this spur is owned and operated by the railroad; that the succeeding 1,619 feet south is owned by the stock yards but maintained by the railroad; and that continuing south of the 1,619 feet and connecting with it is another railroad owned section of the spur, about 793 feet long, with which the Swift sidetrack is connected. There was never any question upon this point and it is an undisputed fact that the Swift sidetrack connects with tracks of the New York Central and not with tracks owned by the stockyards.

The defendants except (page 31) to the restatement by the Commission of the principles announced in Baltimore Butchers Livestock Company v. P. B. & W. Ry. Co., 20 I. C. C. 124. The portion quoted by the Commission from the decision in that case is relevant and controlling here. It is merely to the effect that a carrier may not by private contract avoid compliance with duties imposed upon it by the Interstate Commerce Act.

The conclusions of the petition commencing at page 33
1023 are based upon the errors and fallacies stated in the earlier parts of the petition and therefore need not be separately answered.

Commencing on page 35 of the petition and continuing into page 37, defendants assert that the Commission misconstrued and misapplied the decision of the Supreme Court of Ohio in Morgan Run Ry. Co. v. Public Utilities Commission, 120 N. E. 295. According to defendants that decision was based upon deeds, relationships, and other matters extraneous to the public utilities act. We submit, however, that the question of who was the nephew, niece, or cousin of some one else was not the basis upon which the court placed its decision. The issue, as stated by the court, was as follows: "It is contended that the order of the commission requires the railway company to furnish facilities and *operate a line on property not owned by it*, that the commission has no jurisdiction to require one who is not a common carrier to act as such, and that *the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction.*" [Italics ours.]

The defendants next assert that the commission erred (petition, pp. 39–44) in not giving adequate weight to the decisions in Bedford-Bolling Green Stone Co. v. Oman, 134 Fed. 441, and Sholl Bros. v. Peoria & P. U. Ry. Co., 276 Ill. 267, 114 N. E. 529.

1024 The short answer to this contention is that in neither case did the plaintiff have a track which connected with the public tracks of the railroad company as does the Swift track in Cleveland.

The case next cited by defendants (petition, p. 42) Fort Worth Stockyards Company v. Brown, 161 S. W. (2d) 549, does not even relate to railroad property, but to the use of a runway in a public stockyards. The Federal Packers and Stockyards Act (7 U. S. C. A. secs. 181–229) contains no definition of stockyards property similar to the definition of "railroad" contained in section 1 (3) (a) of the Interstate Commerce Act. It might be noted in passing that a complete answer to all of these contentions will be found in Ayres Mercantile Co. v. Union Pac. R. Co., 16 F. (2d) 395, from which we quoted at pages 80–82 of our exceptions dated August 1, 1945; and in Alton R. Co. v. Illinois Commerce Commission, 305 U. S. 548, 83 L. ed. 344, quoted at pages 75–77 of the same document.

The defendants further assert (petition, p. 37) that the commission erred in applying the law stated in the five cases cited on that page. The short answer is that the law stated in those cases applied to the factual situation now before the Commission, whereas the cases cited by the defendants apply to situations where the facts were widely different and in some cases the property involved was not railroad property.

For example, defendants complain (petition, p. 38) that the decision and order ignore Limits Industrial Building Cor-

1025 poration v. B. & O. C. Terminal Co., 258 I. C. C. 438. The facts involved in that case, as well as the decision of the Commission, are discussed at length at pages 57–61 of our exceptions dated August 1, 1945. The important distinction to be noted is that the track of the complainant in the Limits case was not connected with the rails of the line-haul carrier, as are the tracks of complainant at Cleveland, and we assume that it was because of this vital distinction that this case was not mentioned in the Commission's decision.

CONCLUSION

The petition is necessarily based upon the assertion that the Commission erred in holding that track 1619 has been and is now devoted to a public use. But the facts are to the contrary. The Commission points out (sheets 3, 5, and 9 of decision) that track 1619 merely connects two portions of the railroad track owned and operated by the New York Central, which by its own New

York Central track serves 7 industries in the same general area; and that for many years track 1619 has been leased to the New York Central and has been maintained by it. The commission further finds that (sheets 11, 12, 17 of decision) this maintenance constituted compensation to the stockyards company for the use of the track. It might be added that compensation would have been unlawful unless the track were being used by and devoted to the public business of the railroad common carrier, the New York Central.

It is certain that this track has been devoted to a public
1026 use for more than 30 years by a common carrier by railroad which is subject (with respect to this track) to the applicable provisions of the Interstate Commerce Act. No particular form or ceremony is necessary in order to devote a track to the public service of a railroad common carrier. All that is required is the assent of the owner of the property and the fact of its being used for the public purposes intended by the lessor.

The facts are undisputed and the necessary legal conclusions are stated in the majority report. It is respectfully submitted that the petition for reconsideration should be denied.

ROSS DEAN RYNDER,
Attorney for Complainant.

CHICAGO, ILLINOIS,
Due date August 31, 1946.

1027 CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing by first-class mail a copy thereof to each party.

Dated at Chicago this 29th day of August 1946.

ROSS DEAN RYNDER,
Attorney for Complainant.

1028 In the Supreme Court of the United States

Statement of points to be relied upon and designation of parts of the record to be printed

Filed Aug. 5, 1947

Come now the appellants and say that they will rely in brief and oral argument before this Court on the points made in their assignment of errors on their appeal in the above-entitled cause.

Appellants further designate the entire record in this cause as filed in this Court for printing by the Clerk, excepting Exhibits 12, 13, 57, and 58, introduced before the Interstate Commerce Commission, and referred to in Item 17 of the praecipe, consisting.

of blueprints, which four exhibits need not be printed. Said blueprints may be considered a part of the record, although unprinted, for use in oral argument and briefs by all counsel the same as if printed.

PHILIP B. PERLMAN,
V. B.
Solicitor General,
For the United States of America.

1029 Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel.
Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.
John P. Staley,
JOHN P. STALEY,
For Swift & Company.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed by this day mailing a copy of the same to all counsel for appellees in this case.

Dated August 4, 1947.

Edward J. Hickey, Jr.,
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General.

1030 [File endorsement omitted.]

1031 Supreme Court of the United States

Order noting probable jurisdiction

October 13, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] File No. 52,153. Northern Ohio, D. C. U. S. Term No. 223. The United States of America, Interstate Commerce Commission and Swift & Company, Appellants vs. The Baltimore and Ohio Railroad Company, et al. Filed July 22, 1947. Term No. 223 O. T. 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

FILE COPY

FILED
JUL 22 1947

No. 223

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SWIFT & COMPANY, APPELLANTS

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Northern District of Ohio, Eastern Division

CIVIL No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CIVIL No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of Rules of the Supreme Court of the United States, as amended, defendants-appellants United States of America, Interstate Commerce Commission, and Swift and Company submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction

75830-1—47——1

on appeal to review the judgment and decree of the District Court entered in these causes on May 14, 1947. A petition for appeal was presented and allowed on July 11, 1947, together with a presentation of an assignment of errors.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the decisions in these causes is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in these cases: *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612; *United States* v. *Lowden*, 308 U. S. 225; *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98; and *Interstate Commerce Commission* v. *Hoboken Manufacturers' Railroad Co.*, 320 U. S. 368.

STATUTES INVOLVED

Interpretation of a number of sections of the Interstate Commerce Act, as amended (49 U. S. C. 1 *et seq.*), particularly Sections 1 (3a), 1 (6), 1 (9), and 3 (1), and the Elkins Act, Section 2 (49 U. S. C. 42) are involved in this appeal.

THE ISSUES AND THE RULINGS BELOW

The statutory three-judge District Court for the Northern District of Ohio, Eastern Division, by its judgment and decree of May 14, 1947, set aside an order of the Interstate Commerce Commission dated May 3, 1946.

The principal facts giving rise to the order are as follows:

The plant of Swift and Company (intervening defendant-appellant herein) located in Cleveland, Ohio, and those of six other companies are so situated that the loading and unloading tracks on their respective properties can be reached from the main line of New York Central Railroad (hereafter referred to as the Railroad) only by means of a spur track, known as Spur Track No. 245, the initial 132 feet of which is located on Railroad's property and an additional 1,619 feet of which runs across land owned by the Cleveland Union Stock Yards Company (hereinafter referred to as Stock Yards).

This spur track was constructed in 1899 pursuant to a contract between Stock Yards and Railroad. Under this contract Stock Yards paid the cost of constructing this track and also paid for maintaining it. Railroad had the right to use the track, without cost, for business other than that of the Stock Yards so long as this use did not interfere with the business of Stock Yards. By an agreement made in 1924, superseding the contract of 1899, Railroad was required to main-

tain the track. Until 1935 shipments were made over the track to the sidings of the various companies which it reached, including that of Swift and Company.

In 1935, the 1924 agreement was amended by Railroad and Stock Yards so as to prohibit free use of the track by Railroad for "competitive" traffic, which the parties construed to mean livestock. The charge for that use was to be the subject of a separate agreement, but since the charges for such use demanded by Stock Yards were substantially in excess of Railroad's switching charges, no further agreement was made and Railroad discontinued deliveries to Swift's siding. Shipments which Swift billed to its Cleveland plant were delivered to Stock Yards, which assessed yardage charges against Swift for livestock so delivered.

Each of the foregoing agreements between Stock Yards and Railroad was subject to cancellation on comparatively short notice.

Three competitors of Swift having plants adjacent to Stock Yards are reached by Railroad's main line without having to pass over land of Stock Yards.

By its order of May 3, 1946, the Commission required Railroad and other railroad carriers connecting with it to deliver livestock to Swift's siding track in Cleveland and to establish and maintain tariffs for such shipments. The order also required Stock Yards to permit the track

which it owns to be used in the manner directed by the Commission's order. The Commission based its order on Section 3 (1) of the Interstate Commerce Act prohibiting unreasonable preferences or discrimination, Section 1 (6) making it the duty of railroads to establish and observe just and reasonable practices affecting the delivery of property, and Section 1 (9) providing that railroads shall operate upon reasonable terms a switch connection with any private sidetrack which may be constructed to connect with such railroads. The Commission regarded these provisions as complementary.

The Commission's conclusion that delivery of livestock to Swift should be required was based upon its finding that the actual use which had been made of the spur track in question had made it a part of Railroad's system and had given the track a common carrier status which could not be limited or subtracted from by contract between Railroad and Stock Yards.

The District Court set aside the Commission's order primarily upon the ground that the facts did not warrant the finding that the track on Stock Yards land had ever been devoted to public use because, in the view of the court, the Commission had left out of consideration contractual provisions between Stock Yards and Railroad asserting ownership, reserving property rights to limit the character of shipments, and stipulating cancellation rights upon thirty- or sixty-day

notice. Under these circumstances the District Court concluded that the Commission's order constituted an unlawful interference with Stock Yards use of its property.

The report of the Commission upon which its order of May 3, 1946, was based is set out in 266 I. C. C. 55.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants contend that the District Court's judgment is not only erroneous as a matter of law, but if permitted to remain in effect will be productive of much practical harm and serious consequences adversely affecting the public interest in an efficient and adequate public transportation system as required by the National Transportation Policy. If the District Court's holding in these cases is correct, it follows necessarily that any owner of private land over which a spur or side track connection with a railroad passes may, by contract, preclude shipments in commerce except upon such terms as it chooses to impose and interdict completely the jurisdiction of the Commission to enforce the provisions of the Interstate Commerce Act.

We submit that a railroad carrier subject to the provisions of the Interstate Commerce Act cannot enter into a contract the effect of which is to abrogate its obligations under the Interstate Commerce Act. We further contend that by the clear language of Section 2 of the Elkins Act (49

U. S. C. 42), Stock Yards was subject to the jurisdiction of the Interstate Commerce Commission in the circumstances of these cases and was a proper party to the Commission's order. In substance the District Court's decree prevents the Commission from regulating a portion of Railroad's public side track or terminal at Cleveland merely because a portion of such side track or terminal is leased by Railroad from a noncarrier corporation.

The District Court's opinion and decree fails to recognize that under the Interstate Commerce Act a piece of track need not be owned by a railroad company in order to be subject to the requirements of that Act. Section 1 (3a) specifically provides that the term railroads shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation * * * of * * * persons or property * * * including all freight depots, yards or grounds used or necessary in the transportation or delivery of any such property." Appellants contend that it is clear that Railroad operated over the 1,619 feet of track for a considerable number of years "under a contract, agreement, or lease," and that as found by the Commission the track has been devoted to a public use.

Although the District Court in its opinion held the Commission's order invalid on one ground only, in its findings of fact and conclusions of law it held the order invalid upon other grounds. Even though the court stated in its opinion that the facts in these cases as set forth in the Commission's report were not in dispute, it found and concluded that there was no legal basis for the Commission's finding that Section 1 (6), condemning unreasonable practices, was violated. The court also concluded that the Commission had no lawful basis for its findings of violations of Section 1 (9), requiring railroads to operate switch connections with private sidetracks, and Section 3 (1) forbidding unjust preferences or discrimination among shippers.

These other grounds raise important questions as to the meaning and application of the Interstate Commerce Act which will be presented on appeal if the Supreme Court disagrees with the ground of decision stated in the opinion below.

We submit that the foregoing important questions respecting the administration of the Interstate Commerce Act present issues which are substantial.

Copies of the District Court's opinion dated March 11, 1947, its finds of fact and conclusions of law entered May 9, 1947, and its final judgment and decree of May 14, 1947, are appended hereto.

Dated July 1, 1947.

Respectfully submitted.

(S) George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General,

(S) John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,

(S) Edward J. Hickey, Jr.,
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Special Assistant to the Attorney General,
For United States of America,

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,

(S) Edward M. Reidy,
EDWARD M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.

(S) Ross D. Rynder,
ROSS D. RYNDER,
For Swift & Company.

756504—47——2

In the District Court of the United States for the Northern District of Ohio, Eastern Division

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CIVIL No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CIVIL No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MEMORANDUM

Before ALLEN, Circuit Judge, and JONES and FREED, District Judges

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JONES, *District Judge:*

These two cases, by stipulation of the parties and order of the Court, were consolidated for hearing and decision since they arise out of the same facts and circumstances, and in each case the same order of the Commission is challenged

and sought to be enjoined. The plaintiffs in both cases were parties to the proceedings before the Commission and it was against both of them that the Commission issued its single order now under consideration.

The facts are not in dispute and are fully set forth in the Commission's opinion and in the several briefs of the parties.

For the purpose of decision the facts briefly may be summarized:

The Cleveland Union Stock Yards Company of Ohio has been engaged in the business of operating public stock yards and a public market, on its own lands, in the City of Cleveland since 1893. Since 1921 its stock yards have been posted as a stock yard under the provisions of the Packers and Stockyards Act and from then until now it has operated under the jurisdiction of the Secretary of Agriculture. It has no railroad equipment and operates no trains or cars.

In May 1899, the Stock Yards Company entered into agreement with The New York Central Railroad Company (then the Big Four) to construct track 1619 (1,619 feet in length) upon lands of the Stock Yards Company to connect with a 132-foot spur from the Railroad Company's main track. The Railroad laid the track and maintained it at the Stock Yards' expense. The Railroad was given the right to use the track, without cost for business other than that of the Stock Yards Company, provided such use did not

interfere with the business of the Stock Yards Company. The agreement contained a 60-day termination clause. In June 1924, that agreement was canceled and another private sidetrack agreement was executed by the Stock Yards Company and the Railroad for operation over lands of the Stock Yards Company and over the same track 1619. A 30-day termination clause was inserted in this second agreement.

Although Swift & Company earlier and successfully had negotiated for a spur and sidetrack directly from the Railroad Company's main track to its own siding (plaintiff's exhibit 11, with map and letters attached) this opportunity of securing direct service was abandoned by Swift & Company as too expensive, and Swift & Company continued to be served by the Railroad Company over the Stock Yards Company's private track and the Railroad's own switch track and "wye" beyond; and this with full knowledge on the part of Swift & Company of the Stock Yards' continued assertion of its complete ownership of track 1619 and the contractual reservation for the termination of its use.

In February 1935, another contract superseded the agreement of June 1924, prohibiting free use of track 1619 for competitive traffic, construed by the Railroad and Stock Yards to mean live stock shipments, a charge for which was to be the subject of separate agreement. No agreement as to the charge for such shipments being reached be-

tween the Railroad Company and the Stock Yards Company, on November 12, 1938, the Railroad's switching charge was made inapplicable to live stock. For some time prior to that date, and ever since, the Railroad has refused to deliver any live stock shipments to Swift & Company's private siding over Stock Yards' track 1619. After an ineffectual exchange of letters between the Railroad and Swift & Company the latter, on September 5, 1941, filed its complaint with the Commission.

We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction. In this case we consider only the legality of its order upon the record. The Railroad complains that the Commission's order requires it to do an unlawful act and that it can not comply with the order because it is without control over the Stock Yards' property and track 1619; that the contract for the use of the track excludes the transportation of shipments of livestock to Swift & Company and that it, the Railroad, is without the means of accomplishing what the Commission orders. The Stock Yards Company asserts that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law.

There are various other allegations in the complaints urged by both plaintiffs to support their contentions that the Commission's order legally cannot stand.

We address ourselves to what we conceive to be the principal and fatal flaw in the Commission's order. We assume, without deciding, that under the Elkins Act the Commission has jurisdiction over the Stock Yards Company when made a party as in this case and has the power to enter a lawful order affecting the Stock Yards in respect of matters in which the Commission has authority.

Upon the hearing of the petition of Swift & Company seeking to require the Railroad to deliver, and the Stock Yards to permit delivery of, its shipments of livestock to its plant over track 1619, the Commission ordered these two complainants to do so, notwithstanding the fact that track 1619 is owned by the Stock Yards Company and is wholly upon its private property. The only reason for thus subjecting the private property of the Stock Yards Company to the use of Swift & Company appears to be a finding that track 1619 for a number of years has been devoted to public use.

We think the finding does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the

Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively. Certainly, upon these facts and upon the record there has been no such devotion of track 1619 to public use as to amount to a dedication of the Stock Yards' property as a public highway or as a part of the Railroad Company's system over which the latter lawfully may move shipments of freight or livestock to the Swift & Company plant.

Both Swith & Company and the Commission rely heavily upon *Morgan Run Rwy.* v. *Public Utilities Commission,* 98 U. S. 218; 120 N. E. 295, and *Alton R. R. Co* v. *Ilinois Commission,* 305 U. S. 548; 555. It is our opinion that neither of these cases furnish support for the order. The former we think not pertinent since it arises out of and depends upon the construction of State statutes. Also, in that case there were the following facts which undoubtedly influenced decision: It was conceded that the controlling interest in the railway company and the coal company was owned by substantially the same persons, although in different proportions, and that the same person was president of both companies. In the latter case the owner of the land over which the shipments were required to be made apparently was not a party, nor did the owner present any objection to the use of the private property. This latter decision also was based upon the effect of a State statute. On

page 555 of *Alton R. R. Co.* v. *Illinois Commission, supra,* the opinion makes it clear that the situation here readily may be distinguished. Contrary to the appellant in that case, the Railroad here *is* asserting that it would be a trespasser and without right to continue to use the track as required by the order. At the conclusion of the second paragraph on page 555, the Court cites *Roberts* v. *Northern Pacific R. Co.,* 158 U. S. 1, at page 11; and *Northern Pacific R. Co.* v. *Smith,* 171 U. S. 260, at page 271. In these cases the land owner made no effort to assert ownership, nor did the owner make any objection or take any steps to establish private property rights until long after trespass had been accomplished.

Here, the Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.

Although the Commission holds that track 1619 is now and for some years has been devoted to the public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently and notori-

ously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of track 1619 has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company openly to assert its complete ownership and restrict its use.

It was urged in argument before us by counsel for the Commission that such use of the track of the Stock Yards Company has made it a part of the New York Central Railroad system; and that the Railroad cannot refuse to continue to serve Swift & Company or others over that track since the Railroad acted unlawfully in contracting for its use. If the Railroad was out of bounds in entering into a contract with the Stock Yards Company which permitted withdrawal of service to Swift & Company, its wrongful conduct, if such it was, cannot be rectified by penalizing the Stock Yards Company and by taking part of its property. If the Commission lawfully may compel the Railroad Company to use track 1619 as its own or as one which it controls it would, by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess. The order effectually subordinates and subjects the Stock Yards Company's ownership of its property to the bene-

ficial and preferential use of Swift & Company without due process of law.

We think that jurisdiction of the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property. The Commission can not, as we think, lawfully order the Railroad to do what by law is forbidden by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system. Such transfer of property lawfully can not be made short of condemnation and compensation.

The constant, consistent and notorious control reserved by contracts between the Railroad and the Stock Yards Company is sufficient bar to any legal finding that track 1619 had been devoted to the public use in the sense that the Stock Yards Company has surrendered some portion of its title or that the track thereby has become a public highway or common carrier.

To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

In the view we take of the case, the complainants each are entitled to the relief prayed for.

Treating the proceedings as one upon final hearing, enforcement of the order of the Commission will be permanently enjoined.

Findings and conclusions may be presented for adoption and a decree entered accordingly.

Filed: March 11, 1947.

In the District Court of the United States for the Northern District of Ohio, Eastern Division

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Civil No. 24435

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL., PLAINTIFFS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 24479

THE CLEVELAND UNION STOCK YARDS COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed May 9, 1947. C. B. Watkins, Clerk, U. S. District Court N. D. O.

These two cases, in which the same facts and circumstances are involved and the same Order of the Commission is challenged and sought to be enjoined in each case, were consolidated by stipulation and order of the court and came on for hearing the 25th day of February 1947, upon the

complaints of the plaintiffs, answers, briefs, arguments, and certified record and evidence of all proceedings before the Interstate Commerce Commission, in its Docket No. 28714, entitled *Swift & Company* v. *The Baltimore & Ohio Railroad Company, Erie Railroad Company (Robert E. Woodruff and John A. Hadden, Trustees), The New York Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, The Pennsylvania Railroad Company and the Wheeling & Lake Erie Railway Company, The Cleveland Union Stock Yards Company, and the Livestock Terminal Service Company.*

Upon due consideration, the court adopts the Findings of Fact and Conclusions of Law hereinafter set forth:

FINDINGS OF FACT

The facts are not in dispute and may be summarized as follows:

I

The railroad and property of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company have, since 1930, been leased to and operated by The New York Central Railroad Company (hereinafter referred to as "New York Central"). The main line tracks of said railroad in the City of Cleveland extend in a general easterly and westerly direction, in the vicinity of West 65th Street. The Cleveland Union Stock Yards Company (hereinafter referred to as "Stock Yards")

owns and operates stock yards which are located adjacent to and south of said New York Central main tracks and right of way and bordering the westerly side of West 65th Street. The Stock Yards owns certain private side tracks located on its own land, among which is a private side track, 1,619 feet in length, which extends in a general northerly and southerly direction paralleling, and in close proximity to, the westerly line of West 65th Street. This 1,619 feet of track connects at its northerly end with the initial turnout or lead (132 feet long) from New York Central main tracks located on New York Central right of way, and forms the connecting track between the northern and southerly portions of what is called track No. 245. The southerly end of said 1,619 feet of track connects with a track 793 feet long, which extends southerly and is owned by New York Central and located upon lands owned by Stock Yards, or which lands were reserved for side track purposes by Stock Yards. This 793 feet of track, together with a switch track, known as No. 240 (Exhibit "C"), which diverges from the southerly portion of said hereinbefore described track No. 245, were built in 1910 at the request of and pursuant to arrangements made by Swift & Company (Exhibit No. 11) and track No. 240 was extended in an easterly direction across West 65th Street and thence northeasterly along the West 63rd Street side of Swift & Company's plant to enable delivery of

shipments to Swift & Company's meat processing plant at that point.

II

The Cleveland Union Stock Yards Company of Cleveland, one of the plaintiffs herein, is a non-carrier corporation, organized, existing and doing business under and by virtue of the laws of the State of Ohio, and, since 1893, has been engaged in the business of operating public stock yards and a public market on its own lands in the City of Cleveland. Since 1921, its stock yards have been posted as a stock yard in accordance with the provisions of the Packers and Stockyards Act, subject to the jurisdiction of the Secretary of Agriculture of the United States.

The Cleveland Union Stock Yards Company does not own, control or lease any rolling stock, locomotives or railroad cars of any kind. It operates no railroad. It owns no railroad tracks, other than private switch tracks located on its own land. One of these private switch tracks, designated in these proceedings as track 1619, and mentioned hereinbefore, is involved in this controversy. Carload shipments of all commodities consigned to or from Swift & Company's meat processing plant private side track and the side tracks of other packers and industries in that particular area must traverse this 1,619 feet of track and lands owned by Stock Yards in order for the New York Central to serve such plants with respect to carload shipments.

III

In May 1899, The Cleveland Union Stock Yards Company entered into an agreement with the lessor (The Cleveland, Cincinnati, Chicago & St. Louis Railway Company) of New York Central to construct certain private side tracks upon the lands of the Stock Yards, including the 1,619 feet of track here in question. The railroad laid the track and maintained it at Stock Yards' expense. The railroad was given the right to use the track without cost for business other than that of the Stock Yards Company. The agreement contained a 60-day termination clause.

On June 16, 1924, the agreement of May 1899 was cancelled and another private side track agreement was executed by the Stock Yards Company and the lessor of New York Central, providing for the use and maintenance of the same 1,619 feet of track and other tracks. This agreement contained a 30-day termination clause. The agreement of June 16, 1924, was superseded by an agreement, effective February 1, 1935, which prohibited the use of said 1,619 feet of track for competitive traffic, construed by the railroads and the Stock Yards Company to mean carload shipments of livestock, a charge for which was to be the subject of a separate agreement. The New York Central and the Stock Yards could not reach an agreement as to charges for the use

of said 1,619 feet of track for movement thereover of carload shipments of livestock and on November 12, 1938, the switching charge theretofore published in tariffs of plaintiff railroads for that reason became inapplicable to livestock consigned to or shipped from any industry reached by using said 1,619 feet of track. For some time prior to that date and ever since, plaintiff railroads have refused to deliver any carload shipments of livestock to Swift & Company's private side track or any other industry reached by using Stock Yards' 1,619 feet of track.

In a letter, dated August 14, 1941, Swift & Company notified the plaintiff railroads that all shipments of livestock would thereafter be billed for delivery at Swift & Company's plant in Cleveland, and requested that such delivery be made. After an ineffectual exchange of letters between the railroads and Swift & Company, the latter, an Illinois corporation, having a branch packing plant in Cleveland, Ohio, on September 5, 1941, filed with the Interstate Commerce Commission a complaint against the railroad companies hereinbefore named, the Cleveland Union Stock Yards Company and The Livestock Terminal Service Company (the latter-named company was a subsidiary of the Stock Yards Company and in the interim has been dissolved).

The Cleveland Union Stock Yards Company was named as a defendant in said complaint upon the theory that it was a proper party under the

Elkins Act (Section 42, Title 49 U. S. C.) and subject to the order of the Interstate Commerce Commission. Said complaint alleged, among other things, that Swift & Company is deprived of lawful transportation to which it is entitled in violation of Section 1 (3) of the Interstate Commerce Act, that the railroads had abandoned the operation of a portion of their line of railroad necessary to the Swift & Company's plant in Cleveland, without prior authority therefor, in violation of Sections 1 (18), 1 (19) and 1 (20) of said Act; that Swift & Company is subjected to unjust discrimination by reason of said railroads denying to Swift & Company services which were rendered to three competitors of Swift & Company, in violation of Section 2, and Swift & Company and its traffic had been subjected to undue and unreasonable prejudice and disadvantage, in violation of Section 3 (1) and said Act. In said complaint, Swift & Company sought the re-establishment of tariff provisions and other relief which would result in transportation to its plant in Cleveland of carload shipments of livestock at rates not in excess of the line haul rates of said railroads. The Cleveland Union Stock Yards Company was alleged to be party responsible for the alleged violations of the Interstate Commerce Act in that it refused to permit the delivery of livestock over its 1,619 feet of track.

V

After full hearing, the Interstate Commerce Commission, on May 3, 1946, found in favor of Swift & Company, against all the defendants in the proceedings before it, and at the same time issued the following order:

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3d day of May, A. D. 1946.

No. 28714

Swift and Company

v.

The Baltimore and Ohio Railroad Company, Erie Railroad Company (Robert E. Woodruff and John A. Hadden, Trustees), The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, The Wheeling and Lake Erie Railway Company, The Cleveland Union Stock Yards Company, and Livestock Terminal Service Company

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof,

made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and having found that the present practice of defendants in refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried over their lines and consigned thereto is in violation of section 3 (1), section 1 (6) and section 1 (9) of Part I of the Interstate Commerce Act, and having made the other findings required by said paragraph:

It is ordered, That the above-named defendants, or either of them, be, and they are hereby, notified and required to cease and desist, on or before the 30th day of August 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

It is further ordered, That said defendants, or either of them, be, and they are hereby, notified and required to establish and put in force, on or before the 30th day of August, 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipments of live-

stock carried over defendant's lines and consigned thereto.

And it is further ordered, That this order shall remain in full force and effect until the further order of the Commission.

By the Commission.

[SEAL] W. P. BARTEL,
Secretary.

By request, the effective date of the foregoing order was postponed from time to time, and finally to the _____ day of June 1947.

VI

The record before the Commission shows conclusively that Swift & Company at all times had full knowledge of the Stock Yards' continued assertion of its complete ownership, and reservation of control of use, of track 1619 and the fact that the Stock Yards reserved the right by agreement to terminate the use of said track.

Swift & Company earlier and successfully had negotiated for its own private sidetrack to be connected directly with the New York Central's main track and right-of-way at the north end of West 63d Street (Plaintiff's Exhibit 11, with map and letters attached), but this opportunity of securing service by means of a direct connection to the railroad company's main track was abandoned by Swift & Company as too expensive and Swift & Company then (in 1910) sought and obtained switching service to its private sidetrack, by the use of Stock Yards' 1,619 feet of track,

the construction of an extension of 793 feet of track to the southerly end of said Stock Yards track (being a part of track known as No. 245), and a wye track in connection therewith and extending said wye track across West 65th Street, in order to move cars thereover to Swift & Company's private sidetrack.

VII

At all times, Stock Yards consistently, constantly and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Swift & Company and six or seven other packing plants are served by the New York Central traversing Stock Yards' 1,619 feet of track with the consent of the Stock Yards for delivery of all classes of freight except livestock. Every shipper serving or being served by the use of said 1,619 feet of track has had full knowledge of Stock Yards' said ownership and control of said track. No one has been led to act to his harm by any sufferance or acquiescence by the Stock Yards in the use permitted of its track or by any failure upon the part of Stock Yards more openly to assert its complete ownership or to restrict its use. There is no evidence that Stock Yards has ever acquiesced in any use of its land or said track by the Railroad or Swift & Company, except under the provisions of the sidetrack agreement. The entrance upon the land of the Stock Yards and the use of its track

were not by sufferance, but, from beginning to the end, under the provisions of a written contract, expressly asserting ownership and reserving therein the property right of Stock Yards, limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively, all of which were well understood by Swift & Company, as well as by the Railroad.

In view of the foregoing facts, we think the findings of the Commission with respect to Stock Yards' 1,619 feet of track for a number of years having been devoted to a public use is without legal support in the record. Certainly, upon these facts and upon the record, there has been no such devotion of said 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company system over which the latter may lawfully move shipments of freight or livestock to the Swift & Company plant without permission of the owner.

VIII

The record is clear, and the Commission finds, that each of Swift & Company's three named competitors, i. e., the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, have constructed their own individual private sidetracks to connect directly with the main line railroad and right of way of the New York Central, and delivery to each of said three

named competitors is rendered without using any track belonging to Stock Yards. The physical conditions existing with respect to reaching these three plants are therefore definitely different from the conditions attendant upon reaching Swift & Company's plant.

IX

Railroad plaintiffs urge the point that the Commission's order would require the railroads to disregard the practices and rules promulgated by the Commission in connection with Ex Parte 104, part II, Terminal Services, with respect to placing and spotting of cars on sidetracks of private industries. In view of our findings with respect to the lack of legal support for other parts of the Commission's order, we make no finding with respect to this phase.

CONCLUSIONS OF LAW

I

The Interstate Commerce Commission transcended its constitutional and statutory powers when, in its order, it effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial and preferential use of Swift & Company, without due process of law. If the Commission lawfully may compel the New York Central to use Stock Yards' 1,619 feet of track as the railroad's own track, or as one which it controls, it would, by such

order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess.

II

The Interstate Commerce Commission cannot lawfully order the railroads to do what by law is forbidden, by declaring that the track of The Cleveland Union Stock Yards Company under the circumstances is a part of the New York Central system. Such transfer of property lawfully cannot be made short of condemnation and compensation. These questions are left to the Courts and not to the Interstate Commerce Commission.

III

Jurisdiction over The Cleveland Union Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Interstate Commerce Commission to order The Cleveland Union Stock Yards Company to desist from the practice of asserting or exercising complete ownership of and control over its property.

IV

For the purpose of this case the Court assumes, without deciding, that under the Elkins Act, Section 42, Title 49 U. S. C., the Interstate Com-

merce Commission has jurisdiction over the Stock Yards Company, since it has been made a party in the case, and has the power to enter a lawful order affecting the Stock Yards Company in respect of matters in which the Commission has authority.

V

The Cleveland Union Stock Yards Company is a non-carrier corporation organized under the laws of the State of Ohio in 1893, and it is engaged in a general stockyard business at Cleveland, Ohio. It is posted as a stock yard in accordance with the provisions of the Packers and Stockyards Act and it is thereby subjected to the jurisdiction of the Secretary of Agriculture of the United States.

VI

Whatever may be the legal status of the contract between the Railroad Company and The Cleveland Union Stock Yards Company, restricting the use of said 1,619 feet of track against delivery of livestock to the plant of Swift & Company, the Interstate Commerce Commission cannot lawfully rectify such contract by penalizing The Cleveland Union Stock Yards Company and taking part of its property.

The Cleveland Union Stock Yards Company has never at any time dedicated said 1,619 feet of track to public use as a public highway or a part

of the railroad system. It has constantly, by virtue of sidetrack agreements or contracts, asserted ownership and reserved property rights therein.

VIII

The Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.

Although the Commission holds that said 1,619 feet of track is now and for some years has been devoted to public use this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it has constantly, consistently and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of said 1,619 feet of track has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company more openly to assert its complete ownership and restrict its use.

IX

The constant, consistent and notorious control reserved in written contracts between the railroad and Stock Yards is a sufficient bar to any legal finding that said Stock Yards' 1,619 feet of track had been devoted to the public use, in the sense that the Stock Yards has surrendered some portion of its title or that the track thereby has become a public highway or common carrier. There has not been any such devotion of Stock Yards' 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company's system under the provisions of Section 1 (3) (a) of the Act, over which track the railroad lawfully may move shipments of freight or livestock to the Swift & Company plant.

X

The Interstate Commerce Commission erred as a matter of law in ordering The Cleveland Union Stock Yards to devote the use of its said 1,619 feet of track and the property underlying the same for delivery of livestock to Swift & Company.

XI.

To require the service sought by Swift & Company, not only would amount to appropriation of the property of The Cleveland Union Stock

Yards Company for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

XII

In view of the undisputed disparity existing between the direct private sidetrack connections of Swift & Company's three named competitors and Swift & Company's own indirect private sidetrack connection the Commission exceeded its powers and authority in undertaking to invoke in Swift & Company's behalf the powers of the Commission under the provision of Section 1 (9) of the Act.

Notwithstanding the similarity of active competition and other phases of the same general business in which Swift & Company and its three competitors are engaged, the pronounced dissimilarity in track connections mentioned above in the failure of Swift & Company to bring itself within the purview of Section 1 (9), with respect to its own track connections, removes any basis for holding that there is any discrimination whatsoever against Swift & Company, or any undue and reasonable prejudice and disadvantage to Swift & Company in violation of Section 3 (1) of the Act with respect to delivery of carload shipments of livestock.

XIII

In view of the full knowledge by the complaining shipper of limitations placed upon the railroad's use of another private sidetrack, no legal basis exists for a finding of any violation of Section 1 (6) of the Act.

XIV

No provision is found in Section 1 (3) (a) of the Act to the effect that private property used by a carrier under contract for limited purposes thereby becomes a railroad for unlimited use. With the long history of the limited use permitted and made of Stock Yards' 1,619 feet of track and the full knowledge by the complaining shipper of such limited use, there is not any basis in law for a finding that the use of that track for said limited purposes constitutes it a part of the railroad system for the benefit of the shipper under the provisions of Section 1 (3) (a).

XV

Where, as in this case, the record before the Commission shows that a shipper had the opportunity of constructing its own private sidetrack to connect directly with the main line railroad and right of way of the railroad and such arrangement was available and could be operated with safety and the shipper discards that arrangement and chooses to obtain service to its

private track by the use of another privately owned track, the ownership and control of which was notorious and apparent at all times, there is no legal support for a finding to the effect that said complaining shipper is entitled to continuous service to its plant, nor is there any legal basis for a finding of a violation of Section 1 (9) of of the Act. There is no legal support for the authority or power of the Commission to require railroads to render service in making direct delivery to the private sidetrack of a shipper where there is a legal or physical obstacle preventing such service and where the complaining shipper is, as in this case, well aware of the permissive use only of an intervening private track granted by its owner to the railroads. The fact that the railroads may have gained some benefit for a shipper in obtaining limited use of a privately owned track for a period of time can not be found to have ripened into a right to require the railroad to provide the use of said intervening privately owned track for the further benefit of the shipper.

XVI

A railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in fact available for use. Common carrier services over private sidings and private industrial tracks cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevent it from entering upon those tracks, nor is it within the jurisdiction of the

Commission to order a carrier, or any other party, to take steps to remove such obstructions.

XVII

The complainants herein are entitled to the relief prayed for; the Report and Order of the Commission are beyond the lawful authority of the Commission and wholly illegal and void; said Order is hereby vacated and set aside and the enforcement thereof perpetually restrained and enjoined; The Cleveland Union Stock Yards Company is hereby declared to have the legal right to restrict the use of its industrial sidetrack for the protection of its business; it had, and has, the right to collect such compensation as it deems proper; it had and has the lawful right to cancel its sidetrack agreement with The New York Central Railroad Company and it had and has the legal right to withdraw entirely the use of its sidetrack for the benefit of Swift & Company and other packers and shippers located upon it.

Counsel for plaintiffs will submit order for appropriate judgment in accordace herewith.

(S) FLORENCE E. ALLEN,
Circuit Judge.

(S) PAUL JONES,
District Judge.

(S) E. B. FREED,
District Judge.

MAY 1947.

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No. 223

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., AND THE CLEVELAND UNION STOCK YARDS COMPANY, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

MEMORANDUM FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 7, paragraph (3), appellants, the United States and Interstate Commerce Commission, file this statement opposing appellee's motion to dismiss or affirm. For a discussion of the nature and importance of the case and of the questions presented, we respectfully refer the Court to our jurisdictional statement. The following comments are directed to

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statements contained in appellee's motion to dismiss or affirm, which was served on appellants on August 11, 1947.

After stating that the facts upon which the District Court decided this case, and its conclusions of law, "are so sound and logical in the application of elementary principles that reasonable minds can come to no other conclusion," (p. 1 of brief in support of motion) appellees, somewhat inconsistently we think, set out 14 basic issues they assert are involved in the appeal (pp. 4–7 of brief in support of motion).

We think the question before the Court is correctly set out in the Commission's report of May 3, 1946, 266 I. C. C. 55, here under review, where the Commission stated the question as follows (p. 62):

> The carrier's defense presents the question of whether a railroad, by entering into a contract with the Stock Yards Company aimed at compelling shippers making livestock shipments to Swift and the other industries beyond the track of the Stock Yards Company to use the facilities of the Stock Yards Co., can abrogate obligations placed upon it, in the public interest, by the Interstate Commerce Act. * * *

While the facts are depicted at some length in the Commission's decision, for the disposition of this motion, we would like to point out the physical situation very briefly. Leading off the main

line of the New York Central into Cleveland is a spur track, the initial 132 feet of which is owned and operated by the Railroad. This 132 feet connects with a track 1,619 feet long, such track and the land over which it is built being owned by the Cleveland Union Stock Yards Company, but maintained and operated by the New York Central. This piece of track, known as Track 1619, in turn connects with another New York Central track, which runs into the plant of Swift & Company and several other packing plants, where the Railroad's track connects with the private tracks of these plants, upon which commodities are received and delivered by the Railroad. In other words, as the Commission said, Track 1619 is an "essential link" in the movement of commodities from these seven plants to the outside world. Without the use of Track 1619, there is no way for these industries to receive inbound shipments or deliver outbound shipments by rail, directly from their plants. For a number of years, the Railroad transported all classes of freight, including livestock, to and from the plant of Swift and the other industries over Track 1619. Since February 1, 1935, the railroad has transported all freight *other than livestock* to and from these plants.

Conceiving that the use of Track 1619 for the delivery of livestock was injurious to its own business, which was the operation of a stockyard

in Cleveland, the Cleveland Union Stock Yards Company forbade the use of this track by the New York Central for the delivery of livestock (although it could be used and is being used for the movement of all other commodities) except upon the payment of charges for the use thereof which the New York Central considered exorbitant. The Commission, in its report, described these charges as a "penalty", having no relation to the reasonable compensation for the use of Track 1619. The Railroad had operated over Track 1619 under an agreement originally entered into on May 10, 1899, which had been amended from time to time, until February 1, 1935, when a new agreement was made in which it was provided that Track 1619 could not be used for the delivery of livestock except upon the payment of the "penalty" charges. It was then necessary for Swift to take its livestock at certain hold pens in the stockyards, short of its siding, and drive its livestock across a public street to its yards for slaughter, for which additional charges had to be paid to the Stock Yards Company. This gave rise to the proceedings before the Commission. After a full hearing, the Commission held that the failure of the railroads to deliver livestock to the side tracks of the packing plants was an unreasonable practice in violation of Section 1 (6); that the failure of the railroads to deliver such livestock to Swift, while according

delivery to its competitors in Cleveland, constituted a violation of Section 3 (1) forbidding undue prejudice and unjust discrimination; and also held that in furnishing cars for the transportation of all traffic except livestock, and in refusing to operate over the switch connection on livestock, the New York Central was violating the provisions of Section 1 (9).

In its report, the Commission stated that the Cleveland Union Stock Yards Company was of course entitled to reasonable compensation for the use of its track but could not look to one commodity, livestock, for that compensation. It further held that the agreement which the New York Central had entered into could not excuse that carrier from obeying the commands of the Interstate Commerce Act, and, if, as the Commission held, it resulted in an abrogation of its duties under the Act, the contract must give way.

The Interstate Commerce Act recognizes that common carriers need not own all the tracks over which they operate. Section 1 (1) declares that "the provisions of this part shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad * * *." Section 1 (3) (a) provides that the term "railroad" shall include "* * * all the road in use by any common carrier operating a railroad, *whether owned or operated under a contract, agreement, or lease,* and also all switches,

spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * persons or property * * *" (Italics supplied.) Section 1 (4) makes it the duty of every common carrier to provide and furnish transportation upon reasonable request therefor.

In setting aside the Commission's order, the lower court (71 F. Supp. 499) did so on what it conceived to be the "principal and vital flaw in the Commission's order," and held, as to this one point, that the only way the Commission could lawfully order the Railroad to operate over the tracks of the Stock Yards Company, would be by a transfer of property, and this could not be done short of condemnation and compensation. Although, as stated, the district court considered only this one question in its decision, subsequently, when it entered its findings of fact and conclusions of law, it set the Commission's order aside on other grounds, holding that there was no basis for findings of violations of Section 1 (6), 1 (9) or 3 (1). In so doing, appellants submit that the Court clearly substituted its judgment for that of the Commission upon administrative matters.

We submit that the issues involved in this appeal are important in the Commission's administration of the Interstate Commerce Act. As the Commission pointed out, the fact that the New York Central, acting in compliance with its

private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over its spur (livestock) does not alter the fact that the use it is making of the spur, including Track 1619, is generally for all traffic offered and all industries reached. To say that the Stock Yards, while granting the use of its Track 1619 generally to common carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by contract, nullify the laws under which the railroad operates. The Stock Yards is not withdrawing its track from public use but is contracting for its continued use as a part of the railroad's common carrier track. The Commission said, "Whatever may be the right of the Stock Yards to altogether withdraw its track from public use, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common-carrier status of the New York Central's spur No. 245 but that the latter remains, with respect to its said spur, as much subject to the act and its provisions as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places." (266 I. C. C. 55, 65).

The Commission's order was directed primarily to common carriers by railroad over which it has

complete jurisdiction, and when such carriers contract with a non-carrier, the latter must be presumed to know the limitations placed by law upon the carrier's right to contract. The reasonable compensation to which the Stock Yards is entitled for the use of its track does not mean compensation arrived at on the basis of what its earnings would be if the railroad's spur was not open to the carriers for delivery of livestock to points beyond Track 1619. Under the last arrangement entered into with the Stock Yards, the railroad is today operating the connection for every other kind of freight except livestock.

The propriety of the Commission entering its order against the Cleveland Union Stock Yards Company, the owner of Track 1619, a non-carrier, was entirely appropriate under the provisions of Section 2 of the Elkins Act, Title 49, U. S. Code, section 42, which reads:

> § 42. *Parties included in proceedings to enforce law.*—In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations,

> orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers. (Feb. 19, 1903, c. 708, § 2, 32 Stat. 848; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.)

Under this provision the Stock Yards Company, like any other defendant, is bound not to defeat the order. Whatever the right of the Stock Yards to terminate the agreement altogether, and that is not involved here, the carrier cannot continue service for all other kinds of traffic and refuse transportation as to livestock. The Commission was not required to go beyond that undisputed fact at this time and project its judgment into the complete termination of transportation service, which might never occur; it had to stop an actual discrimination that was presently existing and presumably would continue.

Furthermore, the question of complete abandonment of the track might run counter to State law because Section 523 of the Ohio General Code provides that the State Commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over tracks for such railroad.

In treating the Commission's action as condemning the property of the Stock Yards without

just compensation, the District Court erred. There was no condemnation here; the Stock Yard's track had already been devoted to public use and was in fact being used by the railroad for the transportation of all kinds of in-bound and out-bound freight, except livestock. Among other things, the Commission held that the railroad could not, by agreement with the Stock Yards, while using Track 1619 as a part of its line, discriminate against a particular form of traffic, livestock, or against particular shippers, Swift and the others, on the end of the line dependent on the railroad for service.

It is respectfully submitted that the motion to dismiss or affirm should be denied and probable jurisdiction noted.

PHILIP B. PERLMAN,
Solicitor General.
EDWARD J. HICKEY, JR.,
Special Assistant to the Attorney General.

DANIEL W. KNOWLTON,
Chief Counsel,
EDWARD M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 223

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SWIFT & COMPANY,

Appellants,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., AND THE CLEVELAND UNION STOCK YARDS COMPANY,

Appellees.

BRIEF OF APPELLANT SWIFT & COMPANY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

JOHN P. STALEY,
Attorney for Appellant Swift & Company.

Chicago, Illinois,
August 29, 1947.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Preliminary Statement	1
Basic Issues	3
Argument	6
Authorities Cited by Appellees Not Applicable	6
Important Questions Involved	8
Conclusion	10

STATUTES.

Interstate Commerce Act:	
Section 1 (3) (a)	8
Section 1 (6)	9
Section 1 (9)	9
Section 1 (22)	6
Section 3 (1)	9
Elkins Act	8
Packers and Stockyards Act:	
7 U. S. C. A. sections 181-229	7

CASES CITED.

Alabama Cent. R. Co. v. Alabama Public Service Com'n., 200 Ala. 536, 76 South. 862 6

Allowances for Privately Owned Tank Cars, 258 I. C. C. 371 7

Certain-Teed Products Corp. v. C., R. I. & P. Ry. Co., 68 I. C. C. 260 6

El Dorado Oil Works v. United States, 328 U. S. 12, 90 L. ed. 1053 7

Fort Worth Stockyards Co. v. Brown, 161 S. W. (2d) 549 7

General Amer. T. Car Corp. v. El Dorado Term. Co., 308 U. S. 422, 84 L. ed. 361 7

Limits Industrial Building Corp. v. B. & O. C. Term. R. Co., 258 I. C. C. 438 6

Pennsylvania R. Co. v. Public Utilities Com., 298 U. S. 170, 80 L. ed. 1130 7

Sholl Bros. v. P. & P. W. Ry. Co., 276 Ill. 267 6

Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55 ..... 4, 9

United States v. Louisville & N. R. Co., 235 U. S. 314, 59 L. ed. 245 8

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Appellees.

BRIEF OF APPELLANT SWIFT & COMPANY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

PRELIMINARY STATEMENT.

Appellees have filed a motion to affirm the United States District Court's decree or dismiss the appeal herein solely on the alleged ground that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument. They say that the lower court's conclusions of law are so sound that reasonable minds can come to no other conclusion.

Appellant Swift & Company asserts that the questions on which the cause depends are not only substantial but are of greater than usual importance. The lower court's

decision, if permitted to stand, would open the door to inequality in the treatment of shippers, defeat one of the principal objects of the act, hinder the administration of the act by the Interstate Commerce Commission, subject shippers to the arbitrary whims of railroads and lessors of railroad tracks, and establish serious limitations to various sections of the act.

The lower court's decision does violence to the plain language of parts of the act. It results in some measure from a substitution by the court of its own judgment for that of the Commission on purely administrative matters.

The questions involved have never been ruled upon by the Supreme Court in any case embracing comparable facts.

The representations contained in appellants' jurisdictional statement herein, under this court's rule 12, should in themselves adequately refute any contention that the questions involved are not substantial. The court should also note that extensive consideration was given to this case by the Commission, and its report reveals painstaking attention to facts and law.

It might also be here observed that appellees' motion and brief fail to demonstrate that the questions involved are not substantial, but rather they only add confusion to already complicated facts and appear to represent appellees' contentions on the merits.

Within the limited scope of this brief, Swift & Company can merely touch upon the main questions and demonstrate only that the questions raised are substantial. A full and complete hearing, with opportunity to present adequate briefs and oral argument, is necessary to proper consideration of the merits.

The facts are adequately set forth in the jurisdictional statement and need not be repeated here.

BASIC ISSUES

Appellees do not correctly state the questions involved. Their purported statement of issues is entirely erroneous and misleading.

The real issue is whether a common carrier by railroad, subject to the Interstate Commerce Act, which uses as a part of its terminal facilities in Cleveland, Ohio, 1619 feet of track leased by it from the Cleveland Union Stock Yards Company, may violate the duties with respect to the delivery of freight imposed upon the carrier by the Interstate Commerce Act, because the lessor of the track, Cleveland Union Stock Yards Company, demands such violation of law by the lessee railroad common carrier.

The issue may be stated in other language as follows:

Is a railroad excused from conforming to the requirements of the Interstate Commerce Act merely because a short section of the track it uses in performing its common carrier functions is not owned by it but is leased from someone else?

The situation is that the stock yards company leased track 1619 to the New York Central, knowing that the railroad was a common carrier subject to numerous obligations imposed upon it by the Interstate Commerce Act and that the railroad had been and intended to continue using the track in the performance of its common carrier functions under the Interstate Commerce Act. The stock yards company sought to interfere with the performance by the New York Central of its obligations under the act. The Commission ordered the New York Central to perform such statutory obligations. This result was the natural, obvious, and foreseeable consequence of the stock yards company's own acts and conduct. Yet appellees seek to stigmatize the Commission's order in their state-

ment of issues by generous use of such catch phrases as "private sidetrack", "trespass", "virtual appropriation", "without compensation", "to the use and benefit of Swift & Company", and other language which obscures the real facts and issues.

The appellees intimate that the Commission has ordered the stock yards company to desist from asserting and exercising complete ownership and control over its property. As a matter of fact, the stock yards company was not asserting or exercising complete ownership and control but had granted to the New York Central an important incident of ownership, the right to use and occupy the track, and had permitted the track to be devoted to a public use for many years.

Appellees refer to track 1619 as the "private sidetrack of the stock yards." This is plain misuse of simple words of the English language. As stated by the Commission (266 I.C.C. 55, 65), "the agreed as well as actual use by the New York Central of the Stock Yards' track 1619 is not as a mere private track but is as an essential part of its spur No. 245" and, at page 70, "track 1619 is now, and for years has been, devoted to a public use". Obviously track 1619 is not "a private sidetrack."

To say that the Commission's order "appropriated" property of the stock yards is utterly untrue. Not one word will be found in the Commission's report and order which could be construed as ordering an appropriation. The Commission simply considered the evidence, made findings of fact, as it is obligated by law to do, and ordered the defendants to do what the act requires them to do. The stock yards company appropriated track 1619 to the use of the New York Central for the purpose of obtaining, at railroad expense, maintenance of all its tracks at the stock yards. Use of the track for live stock was an unavoid-

able consequence resulting from appellees' own voluntary action, and appellees now unjustly accuse the Commission of appropriating the track.

Appellees use the words "without compensation". No suggestion has ever been made that the stock yards company should not receive just compensation for the use of its track. But Swift is not using the track. The New York Central is using it. If the railroad considers that the rates now charged for transportation to and from the seven industries served over track 1619 are inadequate, the normal procedure would be for the railroad to publish new tariffs containing higher rates. If the higher rates are protested, the Commission will, as it normally does, determine the reasonableness and the lawfulness of the rates. The use by appellees of the words "without compensation" is unjustified.

Appellees also infer that the Commission's order brings about a devotion of the track "to the use and benefit of Swift & Co." It would be a novel contention that a railroad should be excused from performing its duty under the Interstate Commerce Act simply because performance of the duty might benefit someone. Once the principle becomes clear that the railroad is obligated to transport live stock over the track, the other six industries will be in a position to benefit to the same extent as Swift & Company. The order will operate to the benefit of every person in the United States shipping live stock to Swift & Company. The use of such words as "to the use and benefit of Swift & Company" in appellants' statement of issues is misleading.

Obviously the statement of the issues in appellees' brief is incorrect and fallacious. The real issue is as stated above by this appellant.

ARGUMENT.

Authorities Cited by Appellees Not Applicable.

Generally speaking, the facts in the cases cited by appellees are so widely different from those involved here that the distinctions are apparent at first glance. It will be noted that none of such cases were cited by the lower court.

Not one of the cases cited involved a situation where a railroad, in the performance of its common carrier obligations under the Interstate Commerce Act, made public use of a track leased from a third party as a means of moving traffic from one track owned by the railroad to another track which it also owns.

Appellees infer, at page 8 of their brief, that the Commission was without authority to issue its order herein because section 1 (22) of the Interstate Commerce Act provides in substance that the authority conferred upon it shall not extend to the "construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State". This proceeding, however, does not involve such construction or abandonment but rather involves use and regulation of the track which are not affected or proscribed by section 1 (22).

In *Limits Industrial Building Corp.* v. *B & O. C. Term. R. Co.*, 258 I.C.C. 438, *Sholl Bros.* v. *P. & P. W. Ry. Co.*, 276 Ill. 267, and *Alabama Cent. R. Co.* v. *Alabama Public Service Com'n*, 200 Ala. 536, 76 South. 862, cited by appellees, the industries served did not have direct connections to public tracks owned by the railroad furnishing the service as at Cleveland.

In *Certain-Teed Products Corp.* v. *C., R. I. & P. Ry. Co.*, 68 I.C.C. 260, cited at page 16 of appellees' brief, the car-

rier serving complainant did not have any agreement for use of the track there involved, but complainant and two other industries rented the track from its owner for their own private use.

Fort Worth Stockyards Co. v. *Brown*, 161 S.W. (2d) 549, cited by appellees, does not even relate to railroad property but to the use of a runway in a public stock yards. The *Packers and Stockyards Act* (7 U.S.C.A. secs. 181-229) contains no definition of stock yards property similar to the definition of "railroad" contained in section 1 (3) (a) of the Interstate Commerce Act.

Pennsylvania R. Co. v. *Public Utilities Com.*, 298 U. S. 170, 80 L. ed. 1130, cited at page 22 of appellees' brief, involved the entirely different question whether an order of the Ohio Public Utilities Commission, directing railroad companies to observe intrastate rates in switching and delivering at a destination within the state cars of coal brought into the state by private facilities and first delivered to a common carrier for transportation within the state, was valid. Language used in determining that question is of no value whatever here.

In connection with *General Amer. T. Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422, 84 L. ed. 361, cited at page 24 of appellees' brief, the court should note that it was there held that a matter involving primary jurisdiction of the Commission was in issue. Subsequently the Commission did make its findings and allowances for privately owned tank cars in *Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371. In *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 90 L. ed. 1053, the Supreme Court upheld the Commission's findings although they operated solely against a person who was not a common carrier by railroad. The Supreme Court's decision in the latter

case could only have been under the provisions of the *Elkins Act*.

The facts in the other cases cited by appellees are so utterly dissimilar to those here that specific mention of each case is unnecessary.

Important Questions Involved.

The situation here is that the railroad uses track 1619 as a link in its tracks by which it performs its ordinary common carrier service. Not one word in the Interstate Commerce Act indicates that the Commission has any less power to regulate merely because the track is not owned by the railroad. In effect, the decision of the lower court would read out of the act that portion of section 1 (3) (a) providing that the term "railroad" shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals and terminal facilities * * *". If the decision of the lower court is correct, then the Commission is without power to regulate transportation over any other track used but not owned by a railroad. Undoubtedly there are numerous tracks in the United States which are used but not owned by railroads.

If the power to regulate turns on the question whether the track was used merely as a "private sidetrack" or as part of the facilities by which the railroad performs its common carrier functions, then obviously the lower court erred grievously in substituting its judgment for that of the Commission contrary to the general doctrine set forth in *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314, 320, 321, 59 L. ed. 245, 251, to the effect that primary jurisdiction is in the Commission to make findings of that

kind and that courts should not substitute their judgment for that of the Commission. Other cases to the same effect are too numerous to mention.

Although the court, in its opinion, does not profess to make any findings under sections 1 (6), 1 (9), or 3 (1) of the Interstate Commerce Act, nevertheless it will be noted that in its findings of fact and conclusions of law it does substitute its judgment for that of the Commission with reference to such matters and even goes to the extent of finding that delivery of live stock to Swift & Company would prefer Swift & Company over certain other industries.

Obviously the limitations sought to be imposed on the Commission by the lower court would greatly reduce the effectiveness of those sections for preventing discriminations and unreasonable practices, and the shippers and consignees would be placed at the mercy of the railroad and the track lessor in any case where a railroad uses track which it leases instead of owns.

At 266 I.C.C. 55, 62, *et seq.*, the Commission sets forth reasoning and authorities which offer the strongest kind of evidence that the decision of the Commission, rather than that of the lower court, is correct.

Numerous other authorities which this appellant will cite in its brief on the merits support the Commission's order and condemn the decision of the lower court.

CONCLUSION.

This case involves questions of great importance to shippers, consignees, and the public generally, and to the Interstate Commerce Commission in administering the act. The motion of appellees to affirm or dismiss should be denied.

Respectfully submitted,

JOHN P. STALEY,

Attorney for Appellant Swift & Company.

August 29, 1947.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Summary of argument	12
Argument	17
I. The railroads' refusal to make direct delivery of livestock to sidings located on their line is a breach of their legal duty to the public as common carriers, which the Commission had power to remedy by its order	20
A. If Track 1619 were owned by the New York Central, then clearly the Interstate Commerce Act has been violated, and the Commission's order would be unassailable	22
B. In view of Section 1 (3) (a) of the Interstate Commerce Act, the situation is not altered in any respect by the circumstance that Track 1619 is owned by a non-carrier	30
C. Nor is the situation altered by reason of the New York Central's contract with the Stock Yards which provides expressly for discrimination against livestock, since common carriers cannot by contract relieve themselves from their duties to the public	38
D. The Stock Yards' right, if any, to compensation from the New York Central for the use of its land has no bearing upon the validity of the Commission's order requiring the railroads to perform their duties to the public	44
II. The Commission's order does not appropriate the Stock Yards' property for the use of Swift	50
III. In any event, the Commission's order simply requires the railroads to deliver interstate livestock to Swift's track, and does not necessarily involve any use of Track 1619	64
Conclusion	76
Appendix A: Pertinent Statutory Provisions	77
Appendix B: Map	facing 90

CITATIONS

Cases: Page

Alton R. Co. v. *Illinois Comm'n.*, 305 U. S. 548 ..... 34, 52, 55
F. C. Ayres Mercantile Co. v. *Union Pacific Railroad Co.*, 16 F. 2d 395 34
Barlotti v. *Public Utilities Comm.*, 103 Ohio St. 647 ..... 34, 52, 56, 62, 63
California v. *United States*, 320 U. S. 577 26
Chicago & Northwestern Ry. Co. v. *Ochs*, 249 U. S. 416 ..... 34, 52
Cleveland, etc. Ry. v. *United States*, 275 U. S. 404 ..... 17, 31, 72, 73
Coe v. *Columbus, P. & I. R. R. Co.*, 10 Ohio St. 372 47
Gibbs v. *Baltimore Gas Co.*, 130 U. S. 396 40
Glen Falls Portland C. Co. v. *Delaware & Hudson Co.*, 66 F. 2d 490, certiorari denied, 290 U. S. 697 44
Goodin v. *Cincinnati & W. Canal Co.*, 18 Ohio St. 169 47
Interstate Stock-Yards Co. v. *Indianapolis Union Ry. Co.*, 99 Fed. 472 24
Legal Tender Cases, 12 Wall. 457 40
Louisville & Nashville R. R. v. *Mottley*, 219 U. S. 467 ..... 14, 41, 42, 45
Louisville & Nashville R. Co. v. *United States*, 238 U. S. 1 24
Louisville & Nashville R. Co. v. *United States*, 242 U. S. 60 24
Merchants' & Manuf. Traffic Ass'n v. *United States*, 231 Fed. 292, reversed on other grounds, 242 U. S. 178 44
Milheim v. *Moffat Tunnel Dist.*, 262 U. S. 710 ..... 34, 52
Missouri Pacific R. Co. v. *Norwood*, 283 U. S. 249 26
Mitchell v. *United States*, 313 U. S. 80 ..... 16, 36, 66
Morgan Run Railway Co. v. *Public Utilities Comm.*, 98 Ohio St. 218 ..... 34, 52, 56, 62
Morrell & Co. Terminal Allowance, 263 I. C. C. 69 49
National Refining Co. v. *St. Louis, I. M. & S. Ry. Co.*, 237 Fed. 347 34
New York v. *United States*, 331 U. S. 284 ..... 70, 71
New York Central R. R. v. *Gray*, 239 U. S. 583 46
Norman v. *Baltimore & O. R. Co.*, 294 U. S. 240 40
Northern Pacific Railroad Co. v. *Smith*, 171 U. S. 260 47
Northern Pacific Railway v. *North Dakota*, 236 U. S. 585 21
Northern Pacific Ry. Co. v. *United States*, 316 U. S. 346 ..... 24, 26
Olcott v. *The Supervisors*, 16 Wall. 678 64
Pennsylvania Co. v. *Platt*, 47 Ohio St. 366 47
Pennsylvania Co. v. *United States*, 236 U. S. 351 ..... 32, 33, 35
Philadelphia, Balt. & Wash. R. R. v. *Schubert*, 224 U. S. 603 ..... 14, 41
Roberts v. *Northern Pacific Railroad Co.*, 158 U. S. 1 47
Short v. *Railway*, 27 Ohio Dec. 294 47
Sioux City Switching Case, 241 I. C. C. 623 49
Smith v. *Hoboken R. Co.*, 328 U. S. 123 ..... 16, 66
Spencer Kellogg & Sons v. *United States*, 20 F. 2d 459, certiorari denied, 275 U. S. 566 44
State ex rel. McGhee v. *Morgan Run Ry. Co.*, 99 Ohio St. 439 ..... 60, 61

Cases—Continued Page

Swift & Company v. *Hocking Valley Railway Company*, 243 U. S. 281 34

Texas & Pac. Ry. Co. v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266 70

Thompson v. *Texas Mexican R. Co.*, 328 U. S. 134 ..... 16, 66

Union Lime Co. v. *Chicago and Northwestern Ry. Co.*, 233 U. S. 211 ..... 34, 52

United States v. *Idaho*, 298 U. S. 105 70

United States v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007 44

United States v. *Pennsylvania Railroad Company*, 266 U. S. 191 ..... 16, 26, 36, 66

United States v. *Phillips Petroleum Co.*, 36 F. Supp. 480 ... 44

Weston v. *Barnicoat*, 175 Mass. 454 40

Statutes:

Elkins Act (49 U. S. C. 42):

Section 2 ..... 9, 14, 18, 43, 90

Interstate Commerce Act, as amended, Part I (49 U. S. C. 1, et seq.):

Sec. 1 (1) 78

Sec. 1 (3) (a) 19, 30, 32, 33, 71, 72, 78

Sec. 1 (4) 23, 79

Sec. 1 (5) (a) 79

Sec. 1 (6) 10, 13, 20, 23, 26, 71, 80

Sec. 1 (9) 10, 13, 20, 23, 27, 31, 32, 71, 72, 80

Sec. 1 (18) 81

Sec. 1 (19) 82

Sec. 1 (20) 83

Sec. 1 (21) 84

Sec. 1 (22) 70, 72, 84

Sec. 2 ..... 23, 35, 85

Sec. 3 (1) 10, 13, 20, 23, 36, 71, 85

Sec. 6 (7) 49, 86

Sec. 12 (1) 86

Sec. 15 (1) 87

Sec. 15 (13) 88

Sec. 16 (7) 89

Sec. 16 (8) 89

Sec. 21 89

National Transportation Policy (Act of Sept. 18, 1940, 54 Stat. 898) 18, 77

Ohio Gen. Code, § 8759 ..... 34, 52

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 223

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 148–152) is reported at 71 F. Supp. 499. The report of the Interstate Commerce Commission (R. 28–50) appears at 266 I. C. C. 55.

JURISDICTION

The final judgment of the three-judge district court was entered on May 14, 1947 (R. 190). The petition for appeal was presented and allowed on July 11, 1947 (R. 191–192). The jurisdiction of this Court is invoked under Section 210 of the Judicial Code, as amended by the Urgent De-

ficiencies Act of October 22, 1913 (28 U. S. C. 47a), and under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 345). Probable jurisdiction was noted on October 13, 1947 (R. 619).

QUESTIONS PRESENTED

1. Whether a common carrier by rail can relieve itself of the obligations imposed by the Interstate Commerce Act on such a carrier by entering into an agreement with a non-carrier for restricted and discriminatory operation over a portion of track owned by the non-carrier but maintained and operated by the carrier, which portion of track is essential to reach several industries dependent on the carrier for rail service.

2. Whether the common carrier by rail and the non-carrier can, by making such an agreement, oust the Interstate Commerce Commission of jurisdiction to require the rendering of non-discriminatory rail service over the track in question to the industries concerned.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and of the Elkins Act are set out in Appendix A, *infra*, pp. 77–90.

STATEMENT

This is an appeal from a judgment setting aside an order of the Interstate Commerce Commission. The facts found by the Commission, which are not

in dispute (R. 148), may be summarized as follows:

At Cleveland, Ohio, the packing plant of the appellant Swift & Company (hereinafter called "Swift") as well as the plants of a number of other meat packers, have private sidings which are joined by switch connections with tracks of the New York Central Railroad Company (hereinafter called "New York Central"). These tracks are shown on the map, Appendix B, facing p. 90, *infra*. Some of these packers—Long Dressed Beef Co., Lake Erie Provision Co., and Ohio Provision Co.—have private sidings connected directly with the main line of the New York Central. The other packers, including the appellant Swift, are served by a portion of the New York Central's track known as Spur No. 245. Of this track, the portion connecting with and adjacent to the private sidings of Swift and the six other industries is 793 feet long and is owned by New York Central. The next intervening portion of track, 1619 feet long and known as Track 1619, is owned by the Cleveland Union Stock Yards Co. (hereinafter referred to as "Stock Yards") but is maintained and used by the New York Central as part of its terminal facilities. At the north end of this portion of track a third portion, 132 feet long, affords connection with the main line of the New York Central. (R. 30.)

On the map, Appendix B, the portions of track owned by the New York Central are shown in green, the portion owned by the Stock Yards is yellow, and the private tracks of the industries involved are shown in red. It will be noted that the private track of Swift connects directly with a part of Spur No. 245 that is owned by New York Central. Swift's track was built in 1910; it has been in constant use since that time (R. 31–32).

The other railroads serving the industries connected with Spur No. 245 do so pursuant to a reciprocal switching arrangement whereby New York Central performs the service and its switching charge is absorbed by the line-haul carriers when their revenue exceeds specified amounts. (R. 33.)

Since at least 1910, the New York Central tariff has provided for delivery at Swift's side track under its line-haul rates of all shipments reaching Cleveland via its own line. On November 12, 1938, however, the New York Central cancelled its switching charge on livestock but continued it on all other freight. Since then, there has been no specific tariff authority for movement of livestock to Swift's siding when shipped to Cleveland over lines other than the New York Central, but the New York Central's tariff provision for delivery to Swift's side track of shipments moving over its own line has remained in effect. (R. 33.)

Nevertheless, for some time prior to November 12, 1938, and continuously thereafter, the carriers have refused to deliver any livestock to Swift's siding, whether moved to Cleveland in line-haul service by the New York Central or by other carriers. Instead they have delivered such shipments to the yards of the Stock Yards Company, and have collected the Cleveland line-haul rates. Stock so delivered is driven from the unloading pens through the Stock Yards to an exit directly across the street from Swift's plant, thence through movable gates across Track 1619 and across 65th Street into Swift's slaughterhouse. Yardage charges are collected by the Stock Yards Company for egress from the stock yards. (R. 33–34.)

Prior to 1930, the Stock Yards made no charge for this type of delivery, and little, if any, livestock was delivered directly to Swift's siding by the railroads, although tariff provisions were in effect authorizing such delivery at the Cleveland line-haul rates. About 1930, the Stock Yards attempted to charge packers for delivery effected at the Stock Yards. Thereupon, between January 1, 1930, and February 1, 1935, Swift had 1,161 carloads of livestock delivered directly to its siding. On such shipments it paid the line-haul rates to Cleveland (R. 34). Since August 14, 1941, Swift has billed all its inbound shipments of livestock to its siding, and has demanded delivery

there. The carriers have disregarded the shipper's routing instructions on such traffic, and have made delivery to the Stock Yards instead of to Swift's siding (R. 31). When the carriers ceased to make direct deliveries to Swift and began to make all deliveries at the Stock Yards, they absorbed the Stock Yard's charges until 1942 (R. 34). Since 1943, Swift has been required to pay charges to the Stock Yards in order to obtain possession of livestock unloaded at the Stock Yards (R. 34–35).

The carriers' justification for their failure to make delivery to Swift's siding was placed on the ground that such delivery would involve use of Track 1619, owned by the Stock Yards, and for the use of which it demanded payments which the carriers considered prohibitive (R. 35).

Track 1619 was constructed pursuant to an agreement of May 10, 1899, between the Stock Yards and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (the "Big Four"), predecessor of the New York Central (Exh. 14, R. 347). The Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became the owner thereof. The railroad laid the track and maintained it at the Stock Yard's expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The rail-

road reserved the right, after 60 days' notice in writing, to discontinue the use of the track and remove the connections. (R. 30, 348–349.)

The New York Central keeps Track 1619 in repair and controls and operates the locomotives and other rolling stock which pass over it (R. 30).

A subsequent agreement of June 16, 1924 (Exh. 9, R. 339), superseded the original agreement made in 1899 (R. 30).

Paragraph 4 of the 1924 agreement (R. 340) was as follows:

> Fourth: All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land.

The 1924 agreement also contained a 30-day termination clause (R. 341), but did not provide that railroad use of the track should not interfere with the Stock Yards' business (R. 30). On December 31, 1934, the Stock Yards gave notice under the cancellation clause (Exh. 31, R. 423–424) to the New York Central Railroad, successor through lease to the Big Four. Meanwhile, however, a new agreement effective February 1, 1935,

amended paragraph Fourth to read as follows (R. 339):

> Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, *except for competitive traffic a charge for which use shall be the subject of a separate agreement,* of any and all tracks or portions thereof belonging to the Industry and located on its land.[1]

Under the 1924 agreement as under the one made in 1899, the railroad was entitled to "the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land." But under the amendment made in 1935, there was a restriction against free movement of so-called "competitive" traffic, a term which was construed by all parties to mean "livestock". For such shipments of livestock the Stock Yards demanded that it be paid the same charges which it would have obtained if the livestock had been delivered to the Stock Yards in-

[1] Italics supplied. Except for the insertion of the italicized words, the 1924 agreement was not changed in any respect by the new agreement, which was dated January 25, 1935. (Erroneously printed at R. 338 as "1945", as appears from inspection of the original record.)

stead of directly to the consignees' siding (R. 31). This demand was considered exorbitant and prohibitive by the carriers, and it was for that reason that they ceased to deliver livestock over Track 1619 (R. 35).

However, direct deliveries of commodities other than livestock were continued to the sidings reached via Track 1619, and at other plants competitive with Swift but which could be reached without the use of Track 1619—Long Dressed Beef Co., Lake Erie Provision Co., and Ohio Provision Co.—the railroads continued to make direct deliveries of livestock at the line-haul rates (R. 32).

After Swift's demand on the carriers for direct delivery of livestock to its plants was formally refused by the carrier except as Swift might obtain the Stock Yard's consent for traversing Track 1619 (Exh. 4-5, R. 317–318), Swift filed its complaint before the Commission in September 1941, against The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, The Erie Railroad Company, The Wheeling & Lake Erie Railroad Company, and The New York Central Railroad Company. The Stock Yards was joined as a defendant in the proceeding, pursuant to Section 2 of the Elkins Act (*infra*, pp. 89–90).

The case was twice argued before the Commission (R. 465, 502), after which, on May 3, 1946, the full Commission issued its report (R. 28–50; 266 I. C. C. 55) and order (R. 65–66). The Com-

mission found violations of Section 3 (1), forbidding unjust preference or discrimination among shippers; of Section 1 (6), condemning unreasonable practices; and of Section 1 (9), requiring railroads to operate switch connections with private sidetracks. It accordingly ordered the defendants to cease and desist from the practice of refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, interstate shipments of livestock carried over their lines and consigned thereto. The order further required defendants to establish tariffs providing for such delivery.[2] Petitions for reconsideration filed by the railroads (R. 571–600) and by the Stock Yards were denied on October 7, 1946 (R. 63),

[2] The operative paragraphs of the order are as follows (R. 66):

"It is ordered, that the above-named defendants, or either of them, be, and they are hereby notified and required to cease and desist, on or before the 30th day of August, 1946, and thereafter to abstain from refusing to deliver to the sidetrack of complainant in Cleveland, Ohio, complainant's interstate shipments of livestock carried over their lines and consigned thereto;

"It is further ordered, that said defendants, or either of them, be, and they are hereby, notified and required to establish and put in force, on or before the 30th day of August, 1946, upon not less than 30 days' notice to this Commission and to the general public, as provided in section 6 of the Interstate Commerce Act, and maintain in force thereafter, a schedule or schedules providing for the delivery to the sidetrack of complainant in Cleveland, Ohio, of its interstate shipment of livestock carried over defendants' lines and consigned thereto."

but by subsequent orders the order orginally made was extended so that its effective date was postponed to February 28, 1947, on five days' notice (R. 63, 50–52).

Meanwhile, on November 20, 1946, the railroads brought suit in the court below to set aside the order (R. 4–56), essentially on the ground that it transcended the Commission's statutory and constitutional powers (Par. VIII, R. 18–26). A similar action was filed by the Stock Yards (R. 88–96), which second proceeding was, at the hearing, consolidated with the railroads' action (R. 96). Answers were filed by the United States (R. 57, 96), by the Commission (R. 58–66, 97–103), and by Swift (R. 66–84, 104–106), which had been permitted to intervene (R. 104).

After hearing, the district court of three judges rendered its opinion on March 11, 1947 (R. 148–152), holding the Commission's order invalid because (R. 152) it "effectually subordinates and subjects the Stock Yards Company's ownership of its property to the beneficial use of Swift & Company without due process of law." Although the court in its opinion proceeded on that ground alone, and indicated the respect due the Commission's findings in matters within that body's jurisdiction (R. 149), the court's findings of fact and conclusions of law, filed May 9, 1947 (R. 178–189) are to the effect that there was no violation of Sections 3 (1), 1 (6), and 1 (9) of the Inter-

state Commerce Act, which sections the Commission had found to be violated.*

SUMMARY OF ARGUMENT

The inescapable effect of the ruling below is not only that an owner of private land over which a sidetrack connection with a railroad passes may, by contract, prevent shipments in interstate commerce except on such terms as it chooses to permit, but also that it may thereby oust completely the jurisdiction of the Commission to enforce the Interstate Commerce Act. The decision of the district court thus places the stamp of judicial approval on the erection and operation of private toll gates on interstate rail lines.

I. The railroads' refusal to make direct delivery of livestock to Swift's siding is a breach of their legal duty to the public as common carriers which the Commission had power to remedy by its order. Direct deliveries of livestock to Swift's siding were made from 1910 to 1935, and the railroads continued thereafter to make deliveries and accept shipments there of all traffic other than livestock. The New York Central has not abandoned its track which serves Swift's siding, and that carrier's tariff providing for delivery there of all shipments reaching Cleveland via its own line has never been cancelled. Consequently, with respect to livestock consigned to the Swift siding,

* Counsel for the appellants duly pointed out the inconsistency before entry of the findings and conclusions (R. 172).

the railroads are subject to the duties owed the public at common law and under the Interstate Commerce Act, and they are similarly subject to the regulatory jurisdiction of the Interstate Commerce Commission.

A. The railroads' duties will appear more clearly once it is assumed, contrary to the fact, that Track 1619 is owned by the New York Central.

On that assumption there has been a violation of Section 3 (1), because of the discrimination and singling out of livestock as the sole commodity which the railroads are refusing to deliver, and because Swift is subjected to prejudice since three of its competitors are accorded direct delivery to their sidings while such delivery is denied to Swift. Section 1 (6) is violated because these facts amount to an unreasonable practice; and Section 1 (9), which requires the operation of switch connections and the furnishing of cars for the movement of traffic thereover without discrimination, is therefore also violated.

B. The situation is not altered in any respect by the circumstance that, in fact, Track 1619 is owned by a non-carrier, since Section 1 (3) (a) of the Interstate Commerce Act makes that track a part of the New York Central's "railroad" regardless of ownership. Even if Track 1619 served only Swift instead of all seven industries which in fact are dependent on it, the use to

which it is put by the New York Central would constitute a public and not a private use, and the track would be a part of the carrier's facilities. Significantly, the court below ignored Section 1 (3) (a) of the Act, and undertook to substitute its own appraisal of evidence and its own administrative judgment for those of the Commission.

C. Nor is the situation altered by reason of the New York Central's contract with the Stock Yards which provides expressly for discrimination against livestock. That is the only obstacle in the path of the railroad's compliance with the Act. But no proposition is better settled than the rule that performance of the public duties of common carriers can not be avoided by reliance upon private contracts at variance with the carriers' statutory obligations. *E. g., Philadelphia, Balt. & Wash. R. R.* v. *Schubert,* 224 U. S. 603; *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467. Moreover, by the clear language of Section 2 of the Elkins Act, the Stock Yards was here subject to the Commission's jurisdiction, and was a proper party to the Commission's order.

D. The Stock Yards' right, if any, to compensation from the New York Central for use of its land had no bearing upon the validity of the Commission's order requiring the railroads to perform their duties to the public. Whether the Stock Yards as a matter of state law is now estopped from possessory remedies and in consequence con-

fined to an action for damages, what such damages, if any, might be, or whether the restrictive provision is void against public policy, need not be determined here. The nature and extent of the Stock Yards' rights against the New York Central have no effect on the validity of the Commission's order, any more than the rights of the Mottleys to compensation could affect the validity of the statutory prohibition against passes which was directed to the Louisville & Nashville.

II. The Commission's order does not appropriate the Stock Yards' property for the use of Swift; but the court below so held, apparently on the ground that although there is no taking of such property when hundreds of cars loaded with non-livestock cargoes pass over Track 1619, the Constitution is violated once the Commission requires that a single carload of livestock be similarly hauled, without payment of a yardage fee for services not rendered. The fallacy in this approach lies in its failure to perceive that Track 1619 is devoted to the use of the New York Central and not to the use of Swift, and in its disregard of the decisions of this Court and of the Supreme Court of Ohio to the effect that spur tracks connecting one or more industries with the main line of a railroad are devoted to a public and not to a private use. The holding below, to the effect that the Commission's order amounted to "appropriation of the Stock Yards Company's property for the use of Swift & Company", is plainly and palpably wrong.

III. In any event, the Commission's order simply requires the railroads to deliver interstate livestock to Swift's track, and does not necessarily involve use of Track 1619. That order required no action on the part of the Stock Yards. How and upon what terms the trackage rights needed for the performance of proper service are obtained is a matter of railroad responsibility and managerial discretion. This Court has several times declared, not only that a carrier may not excuse discriminatory service on the ground of inadequate facilities (*Mitchell* v. *United States*, 313 U. S. 80; *United States* v. *Pennsylvania R. Co.*, 266 U. S. 191), but also that the performance of public service by common carriers is a matter of paramount public concern which must not be interfered with because of the pendency of landlord-and-tenant controversies in respect of compensation for property used in railroad service (*Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134).

Whether the Stock Yards may now terminate the New York Central's right to use Track 1619, as it threatened to do after the Commission's order in this case, need not be considered here, primarily because a power to discriminate is not a lesser right included within the power to withdraw altogether. Nor is it necessary to consider whether such a withdrawal would require the New York Central to condemn the necessary trackage rights, in order to comply with the Commission's

order under Section 1 (9). The Commission's power under that provision is not destroyed by the exemption in Section 1 (22). *Cleveland, etc., Ry. v. United States*, 275 U. S. 404. In any event, the New York Central has threatened no abandonment; and Swift as a shipper which has built its siding to the railroad's line is no more bound to look to the title to Track 1619, and is no more bound by knowledge of any infirmity in that title, than it is concerned with the title to or the contractual arrangements respecting any portion of the right-of-way of the railroad system to which its private tract connects.

The order of the Commission requiring the railroads to render nondiscriminatory service was valid, and the judgment of the district court, which sanctions the continued enforcement of a contract obstructing the free flow of interstate commerce by the levy of a discriminatory toll on a single commodity, should be reversed.

ARGUMENT

The inescapable effect of the district court's holding is not only that any owner of private land over which a spur or sidetrack connection with a railroad passes may, by contract, prevent shipments in interstate commerce except on such terms as it chooses to permit, but also that it may thereby oust completely the jurisdiction of the Commission to enforce the provisions of the Interstate Commerce Act. The decision below thus puts the stamp of judicial approval on the erec-

tion and operation of private toll gates on interstate rail lines. If permitted to stand unreversed, the ruling below will be productive of serious consequences adversely affecting the public interest in an efficient and adequate public transportation system, in direct violation of the National Transportation Policy declared by Congress (*infra*, p. 77).

These consequences follow because the decision under review is clearly erroneous as a matter of law. First, a railroad carrier subject to the provisions of the Interstate Commerce Act cannot enter into a contract the effect of which is to abrogate its obligations under that Act; the court below held that it could, and enforced the contract. Next, the clear language of Section 2 of the Elkins Act (*infra*, pp. 89–90) subjects to the jurisdiction of the Commission any party affected by a practice under consideration, and authorizes orders to be made against such parties to the same extent as are authorized with respect to carriers; the decree below prevents the Commission from forbidding obvious discrimination in the use of the carrier's sidetrack or terminal at Cleveland merely because a portion of such sidetrack or terminal is leased by the carrier from a noncarrier.

The basic and all-pervading error of the court below was its failure to recognize that a piece of track need not be owned by the operating carrier in order to be subject to the requirements of the

Interstate Commerce Act. Section 1 (3) (a) (*infra*, p. 78) specifically provides that the term "railroad" shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of * * * persons or property * * * including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." We think it clear from the record that the railroad operated over the 1,619 feet of track for over forty years "under a contract, agreement, or lease," and that, as the Commission found, the track has in fact been devoted to a public use. Whether such devotion to a public use in fact constituted a dedication to a public use as a matter of law is a question of Ohio real property law; the significant point here, in our view, is that, by reason of Section 1 (3) (a) of the Interstate Commerce Act, Track 1619 is just as much a part of the New York Central's railway system and equally subject to the requirements of the statute as any other 1,619 feet of track located wheresoever it may be in the same system, and that the ownership of Track 1619 is quite as immaterial as the ownership of any other portion of the New York Central's underlying right-of-way.

The error of the court below is emphasized by

the inconsistency between its opinion on the one hand and its findings and conclusions on the other. The opinion holds the Commission's order invalid on the sole ground that the order amounted to a taking of the Stock Yards' property without compensation, for the benefit of Swift; it specifically stated (R. 148) that the facts were not in dispute and were fully set out in the Commission's report, and noted (R. 149) that "We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its jurisdiction." But the court's findings and conclusions are to the effect that there was no legal basis for the Commission's findings of violations of Section 1 (6), condemning unreasonable practices, of Section 1 (9), requiring railroads to operate switch connections with private sidetracks, and of Section 3 (1), forbidding unjust preferences or discrimination among shippers. Thus the court in its findings and conclusions does precisely what the court in its opinion said it could not and should not do.

I. THE RAILROADS' REFUSAL TO MAKE DIRECT DELIVERY OF LIVESTOCK TO SIDINGS LOCATED ON THEIR LINE IS A BREACH OF THEIR LEGAL DUTY TO THE PUBLIC AS COMMON CARRIERS, WHICH THE COMMISSION HAD POWER TO REMEDY BY ITS ORDER

The New York Central, and other railroads involved herein, are unquestionably common carriers engaged in interstate transportation of gen-

eral commodities, including livestock. No claim is made that their undertaking or holding out to transport for the public is limited to transportation of passengers, as distinguished from freight (cf. *Northern Pacific Railway* v. *North Dakota*, 236 U. S. 585, 595), or to transportation of certain particular commodities, excluding livestock. In fact they deliver livestock to the private sidings of various packers in Cleveland; and indeed do not refuse to haul livestock consigned to Swift's plant in Cleveland, although they do disregard the routing instructions on such traffic and instead of making delivery at Swift's private siding connecting with the New York Central they make delivery to the Stock Yards. This practice enables the Stock Yards to collect a charge for permitting the livestock to go through its own gates and to cross the street to Swift's plant. Ever since installation in 1910 of the switch connection between the New York Central track and the private sidetrack at Swift's Cleveland plant, the New York Central tariff has provided for delivery at Swift's siding of all shipments reaching Cleveland via its own line,* and until November 12, 1938, the railroads' tariffs provided by means of a switching charge for direct delivery at Swift's siding of livestock

* References here to the New York Central include its predecessor, the Cleveland, Cincinnati, Chicago and St. Louis Railway (or "Big Four"), which in 1939 was taken over for direct operation by the New York Central.

shipped to Cleveland over lines other than the New York Central. From 1910 to 1935 the railroads made direct deliveries of livestock to Swift's siding; and they continued thereafter to make deliveries and accept shipments there of all kinds of traffic other than livestock. There has been no abandonment of the New York Central track serving Swift's siding (compare pp. 66–72, *infra*). It is, therefore, quite clear that with respect to livestock traffic consigned to the Swift siding the railroads are subject to the duty owed to the public by an interstate common carrier by rail, including the statutory obligations imposed by the Interstate Commerce Act as amended, and that they are similarly subject to the regulatory jurisdiction of the Interstate Commerce Commission.

A. If Track 1619 were owned by the New York Central, then clearly the Interstate Commerce Act has been violated, and the Commission's order would be unassailable.

The issues in the present case will appear more clearly, and the duties resting on the carrier will be brought into sharper focus, if we assume, contrary to the fact, that Track 1619 is owned by the New York Central. Thereafter, once those duties have been discussed and analyzed, we shall be ready to consider whether and to what extent the carrier's duties are varied by reason of its non-ownership of that portion of its system.

The Commission in its report, after summariz-

ing applicable provisions of the Interstate Commerce Act which define some of the public duties of common carriers and enforcement powers of the Commission (R. 35–36; 266 I. C. C. at 62–63), went on to find that three specific provisions of the Act had been violated: Section 3 (1), prohibiting undue preference and prejudice; Section 1 (6), prohibiting unreasonable practices relating to delivery; and Section 1 (9), requiring the operation of switch connections and furnishing of cars for the movement of traffic thereover without discrimination. (R. 41, 42, 45; 266 I. C. C. at 68, 69, 72.) It is plain that the undisputed facts set forth in the Commission's report would disclose unquestioned violations of these provisions of the Act[5] if the New York Central had owned Track 1619.

Section 3 (1) is violated in two respects: Livestock traffic is subjected to an undue prejudice as compared with other species of traffic, in violation of the provision that carriers shall not subject "any particular description of traffic" to such a disadvantage. Moreover Swift is subjected to undue prejudice, and its competitors receive a corresponding preference, in violation of the prohibitions against so treating "any particular person." It seems evident, as the Commission

[5] The facts disclosed would apparently also have constituted violations of Sections 1 (4) and 2 (*infra*, pp. 79, 85), but the Commission did not make specific findings under those sections.

holds, that the railroads cannot lawfully single out and exclude livestock from the traffic transported by them as common carriers over their lines. *Louisville & Nashville R. Co.* v. *United States*, 238 U. S. 1; *Louisville & Nashville R. Co.* v. *United States*, 242 U. S. 60, 74; *Northern Pacific Ry. Co.* v. *United States*, 316 U. S. 346, 347-8; *Interstate Stock-Yards Co.* v. *Indianapolis Union Ry. Co.*, 99 Fed. 472, 483 (C. C. D. Ind.). As this Court said in the case first cited (238 U. S. at 19):

> Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers cannot say that the Yard is a facility open for the switching of cotton and wheat and lumber but cannot be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the Yard was put back under the protection of the proviso to § 3, the Appellants cannot open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others.

It seems equally evident that Swift is subjected to

a competitive disadvantage when three competitors in Cleveland (Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company) are accorded direct delivery to their private sidings while such delivery is denied to Swift. As the Commission found (R. 41; 266 I. C. C. at 68)—

> This service is performed by the defendant carriers at the line-haul rates to Cleveland, and the three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects com-

plainant to undue prejudice and unduly prefers the competing plants above named.

The violation of Section 1 (6) is equally plain. That provision requires railroads to observe "just and reasonable * * * practices affecting * * * rates, * * * the facilities for transportation, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property." Refusal to deliver livestock to Swift's plant, while delivering to Swift's competitors, is plainly a "practice" within the meaning of the statutory language. *United States* v. *Pennsylvania Railroad Company*, 266 U. S. 191, 199; *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 257; *Northern Pacific Ry. Co.* v. *United States*, 316 U. S. 346, 348; *California* v. *United States*, 320 U. S. 577, 584–5. The Commission's findings with respect to the facts bearing upon the reasonableness of the carriers' delivery practice are as follows (R. 41–42; 266 I. C. C. at 68–69):

> The railroad's spur and complainant's sidetrack are available today, just as they have been for years, for the delivery of livestock directly to complainant's plant. For years all the defendant railroads recognized that the performance of such service was included in the line-haul rates to Cleveland and, even today, the New York Central's tariffs provide for the service at such rates. The only reason advanced for the failure to perform such service is the question as to

the New York Central's right to use its spur for the delivery of livestock because of its contract with the Stock Yards respecting the use of track 1619. We have found, however, that such contract has not altered the common-carrier status of the spur or the railroad's duties with respect thereto under the provisions of the act. Accordingly, based on the above facts, circumstances, and considerations, we find and conclude that the defendants' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1 (6) of the act.

Violation of Section 1 (9) is likewise clearly established. This provision of the Act requires a railroad, upon application of a shipper, to "operate * * * a switch connection with any * * * private side track which may be constructed to connect with its railroad" where such connection is safe, practicable, and will furnish sufficient business, and to "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." The Commission found that Swift is a "shipper" within the meaning of Section 1 (9), and that all the other conditions existed which the statute requires as prerequisite to the issuance of an order thereunder by the Commis-

sion. These findings specify that (R. 43, 44–45; 266 I. C. C. at 70, 71–72):

> The switch connection is actually built and in operation for all traffic other than livestock, and clearly is a part of the railroads' common-carrier facilities as defined in section 1 (3) (a). We can require its operation for livestock upon reasonable terms, provided the connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." The parties concede that the sidetrack and switch connection fully meet these quoted provisions of the law and that the only obstacle to their use for livestock is the contract discussed herein. We have said that track 1619 is now, and for years has been, devoted to a public use.
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> * * * * * *
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> We find that the complainant has made application in writing to the carrier for operation of the switch connection discussed and has tendered interstate traffic to such carrier; that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant; that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the connection

is practicable and may be made with safety and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready and willing to have transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central. We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section. Consequently, we find that a violation of section 1 (9) of part I of the Interstate Commerce Act follows. This paragraph forbids discrimination against any shipper, resulting from a failure on the part of the carrier to comply with its requirements. The facts show such a violation against the complainant, resulting from defendant's failure to accept and transport its shipments of livestock over the connection under the circumstances discussed in this report.

Clearly, then, on the assumption that Track 1619 was owned by the New York Central, the railroads' refusal to make direct delivery of livestock to Swift's siding is a breach of their duties to the public as common carriers, and

was correctly held by the Commission to constitute a violation of Sections 3 (1), 1 (6), and 1 (9) of the Act.

B. *In view of Section 1 (3) (a) of the Interstate Commerce Act, the situation is not altered in any respect by the circumstance that Track 1619 is owned by a non-carrier.*

It remains now to consider whether the circumstance that Track 1619 is owned by the Stock Yards, a non-carrier, alters either the duties of the railroads or the authority of the Commission. We think it clearly does not. The provisions of Section 1 (3) (a) of the Interstate Commerce Act—which the court below significantly ignored throughout—make it abundantly plain that ownership of a railroad's right-of-way, or of any part thereof, does not vary in the slightest degree the railroad's duty as a carrier. That section (*infra*, pp. 78–79) provides in pertinent part:

> * * * The term "railroad" as used in this part shall include * * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

> The term "transportation" as used in this part shall include * * * all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, * * * and handling of property transported.

In view of this provision of law, the Commission was bound to find that all of New York Central's Spur No. 245, including that portion thereof designated as Track 1619, was a part of that railroad's common-carrier facilities.

With respect to the applicability of Section 1 (9), it may be noted that the Commission's order is authorized under that section without regard to the status of Track 1619, for the reason that Swift's private siding connects with track of the New York Central owned by that carrier. Swift's private siding connects with New York Central track quite as much and quite as clearly as do the private sidings of its competitors, Long Dressed Beef Co., Ohio Provision Co., and Lake Erie Provision Co. As the map in Appendix B shows, Swift's connection is made with the portion of Spur No. 245, which is actually owned by the New York Central, viz., the green portion south of the railroad's main line. Section 1 (9) deals with a carrier's duties in respect of private sidings constructed "to connect with its railroad." *Cleveland, etc., Ry.* v. *United States,* 275 U. S. 404, 408.

Consequently, whatever view may be taken with respect to the status of Track 1619, it is clear that Section 1 (9) is applicable because of the direct connection of Swift's siding with the New York Central's own track. That such track is a part of the New York Central's "railroad" within the meaning of Section 1 (9), is shown by reference to the above-quoted definition of "railroad" given in Section 1 (3) (a).

But the definition in Section 1 (3) (a) is extensive enough to embrace also the portion of Spur No. 245 which is owned by the Stock Yards, but maintained and used by the New York Central. Track 1619 is "road in use by" a "common carrier" operating a railroad. The statute goes on to specify that the definition includes such road "whether owned or operated under a contract, agreement, or lease." A specific provision is then added, including within the definition of railroad all "spurs, tracks, * * * and terminal facilities of every kind used or necessary" in the transportation of property, including all yards and grounds "used or necessary in the transportation or delivery of any such property." The term "transportation" is defined as including "all services in connection with the receipt, delivery, * * * and handling of property transported," a definition which, as applied by this Court in *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 363, 366, carries an obviously broad interpre-

tation.[6] Moreover, "transportation" is specifically stated by the Act to include "all instrumentalities and facilities of shipment or carriage, *irrespective of ownership or of any contract, express or implied, for the use thereof* * * *." [Italics added.]

In view of the foregoing statutory language, we think it plain that Track 1619 constitutes a part of the New York Central's "railroad" and that its use is governed by the statutory obligations of the New York Central as a common carrier.

And the same conclusion follows from judicial decisions regarding the status of tracks employed by railroads for the delivery of freight to private sidings. Numerous decisions indicate that the use to which Track 1619 is put by the New York

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[6] "There can be no question that when the Pennsylvania Railroad used these terminal facilities in connection with the receipt and delivery of carload freight transported in interstate traffic, it was subject to the provisions of the Act, * * *. By the amendments to the Act, the facilities for delivering freight of a terminal character are brought within the terms of the transportation to be regulated." (236 U. S. at 363.)

* * * * *

"As we have heretofore shown, the Act, as it now is, provides that transportation which must be furnished to all upon equal terms includes the delivery of freight as part of its transportation. While § 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress." (236 U. S. at 366.)

Central constitutes a public use, embraced within the railroad's obligations as a common carrier. If necessary, the New York Central could exercise the power of eminent domain and condemn the right to use Track 1619 for transportation of all types of traffic to and from the private sidings of Swift and the other industries served by Spur No. 245. *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211, 220–222; *Alton R. Co.* v. *Illinois Comm'n.*, 305 U. S. 548, 553; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 719–720; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416, 419–420; *F. C. Ayres Mercantile Co.* v. *Union Pacific Railroad Co.*, 16 F. 2d 395, 398 (C. C. A. 8); *Morgan Run Railway Co.* v. *Public Utilities Comm.*, 98 Ohio St. 218, 227; *Barlotti* v. *Public Utilities Comm.*, 103 Ohio St. 647, 656; Ohio Gen. Code § 8759. See pp. 51–64, *infra*. Track 1619 is not a private siding of Swift & Company at all.[1] Swift's private siding connects directly with another portion of New York Central Spur No. 245. That spur serves seven industries, and is not used exclusively for the traffic of Swift & Co. But even if Track 1619 served only Swift & Co., it would still be part of the pub-

[1] Track 1619 would not be regarded as a private track of Swift & Company within the meaning of tariff provisions for demurrage charges. See *Swift & Company* v. *Hocking Valley Railway Company*, 243 U. S. 281, 286; *National Refining Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 237 Fed. 347 (C. C. A. 6).

lic facilities of the railroad up to the point where it connects with Swift's private siding.

Similar considerations are applicable in determining whether the non-carrier ownership of Track 1619 vitiates the Commission's finding of a violation of Section 3 (1).

The court below concluded (XII, R. 187–188) that there was no undue or unreasonable prejudice and disadvantage to Swift & Co. in violation of Section 3 (1) because of the "pronounced dissimilarity" in the track connections of Swift's competitors, which can reach the railroad's main line without the use of Track 1619. There are several answers to this holding, which, as already noted, goes beyond and is inconsistent with the rationale of the opinion.

To begin with, the determination whether prejudice or preference under Section 3 (1) is or is not undue has been recognized as an administrative matter within the sole jurisdiction of the Commission since at least *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361. Moreover, in any event, the Commission found (R. 41; 266 I. C. C. at 68) that "with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same," and that the same similarity exists in respect of commercial competition. The

difference which the court below emphasized and on which appellees here insist is merely a circumstance of private concern to the railroads, with respect to the terms upon which they have acquired their facilities, and has no bearing upon the character of the transportation service to be accorded the public, the subject matter with which Section 3 (1) deals. When Swift & Co. connected its siding to the New York Central spur at 63rd Street, Cleveland, the ownership of the intervening Track 1619 was as little relevant to the New York Central's duty to furnish nondiscriminatory service as the ownership of that road's main line or the nature of the mortgage liens on any portion thereof.*

* Even with Section 1 (3) (a) out of the case, i. e., assuming *arguendo* that Track 1619 is not a facility which the railroads may use in delivering livestock to Swift, the law is clear that carriers may not justify discriminatory treatment in violation of Section 3 by showing that they lack the facilities for affording nondiscriminatory service to the injured party. *Mitchell* v. *United States*, 313 U. S. 80, 90, 96; *United States* v. *Pennsylvania Railroad Co.*, 266 U. S. 191, 198–199. In the case last cited the Court characterized as "unsound" the argument, identical with appellees' contention here, "that a preference granted certain shippers served by a carrier by virtue of the ownership of tracks or trackage rights over other shippers not reached by the carrier, because it does not own tracks or trackage rights which would enable it to reach them, cannot warrant a finding of undue discrimination." Consequently, even upon the untenable assumption that the railroads may not use Track 1619 for livestock traffic, the Commission's order, insofar as it was based on findings under Section 3 (1), must be upheld.

The court below said in its opinion (R. 152),

> To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks.

We deal at length below, pp. 50–64, with the fallacy inherent in the notion that the property of the Stock Yards has been taken for the use of Swift. The point presently pertinent is that the district court erred in suggesting that the Commission's order would give Swift a preference. For the fact of the matter is that Swift built its own connecting sidetrack in 1910, that it still owns that track—shown in red on the map, Appendix B—and that Swift's sidetrack is, equally with those of its competitors, connected with tracks owned by the New York Central (marked green on the map). The circumstance that Swift connects with a part of Spur No. 245 while its three competitors to the north connect with the carrier's main line is of course immaterial, once Sections 1 (3) (a) and 1 (9) are, as they must be, read together. There is nothing in the Interstate Commerce Act which requires that a shipper must connect only with main lines of carriers in order to enjoy nondiscriminatory service and switching privileges.

and the court below commtted plain error when, in effect, it held that there was.

Consequently, on the facts of record with respect to the non-carrier ownership of Track 1619, the railroads' refusal to make direct delivery of livestock to Swift's private track is a breach of their public duties as common carriers, and was correctly held by the Commission to constitute a violation of Sections 3 (1), 1 (6), and 1 (9) of the Interstate Commerce Act. The Commission's order requiring the carriers to cease and desist from the practices thus found to be unlawful was therefore a valid exertion of the Commission's regulatory authority. The judgment of the court below setting that order aside was erroneous in that, *inter alia*, it wholly ignored Section 1 (3) (a) of the Act, and undertook to substitute its own appraisal of evidence and its own administrative judgment for the findings and administrative determination of the Interstate Commerce Commission.

C. *Nor is the situation altered by reason of the New York Central's contract with the Stock Yards which provides expressly for discrimination against livestock, since common carriers cannot by contract relieve themselves from their duties to the public.*

The court below concluded (XVI, R. 189) that "Common carrier services over private sidings and private industrial tracks cannot be compelled, where obstructions against the use thereof, either

legal or physical, not caused by a carrier, prevent it from entering upon those tracks, nor is it within the jurisdiction of the Commission to order a carrier, or any other party, to take steps to remove such obstructions."

Track 1619 interposes no physical obstructions to the carriage of interstate freight from the New York Central's main line to Swift & Co.'s private switch. Physically the road is just as uninterrupted now as it has been since the switch connection was first made in 1910, and in fact the railroads deliver to Swift & Co. cars containing every commodity other than livestock.* Consequently the only obstruction is the contract between New York Central and the Stock Yards, as amended in 1935, with its specific provision requiring discrimination against livestock. It is that contract which constitutes the principal, indeed the sole excuse, advanced by the carriers here for their failure to perform their duty of delivering livestock to Swift's siding. And, therefore also, the only question as to the Commission's power is whether it can require the rendering of nondiscriminatory service by the carrier in the face of that provision.

If the court below is correct, if the contractual

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* We are advised that the Stock Yards' letter purporting to terminate the New York Central's right to use Track 1619 (Exh. E, R. 54–56) was in effect withdrawn after the judgment below, and that since that time Track 1619 has been, and is now being, used for the transportation of all commodities other than livestock. See *infra*, pp. 67–69.

provision which affirmatively requires discrimination can relieve the railroad from its statutory duty to render service without discrimination and can strip the Commission of its power to require carriers to render nondiscriminatory service, then, a new and easy road is open for the evasion of duties required by law. Obviously the court below is in error. No proposition is better settled than the rule that performance of the public duties of common carriers cannot be avoided by reliance upon private contracts at variance with the carriers' statutory obligations. Just as "A man cannot justify a libel by proving that he has contracted to libel" (*Weston* v. *Barnicoat*, 175 Mass. 454, 458, *per* Holmes, C. J.), so a railroad cannot justify violating the Interstate Commerce Act by proving that it has contracted to do so. From the *Legal Tender Cases*, 12 Wall. 457, 549–551, through *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, 308, it has been iterated and reiterated that "Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

This has been significantly so in the field of public utilities. Nearly sixty years ago, in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 410, the Court said:

> It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and

> by agreement compel itself to make public accommodation or convenience subservient to its private interests.

In similar vein, Mr. Justice Hughes (as he then was) declared for the Court in *Philadelphia, Balt. & Wash. R. R.* v. *Schubert*, 224 U. S. 603, 613–614, that—

> To subordinate the exercise of the Federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

The force of the principle was perhaps most strikingly demonstrated in *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, where the rule was retroactively applied to invalidate an agreement entered into for a peculiarly meritorious consideration. Mottley and his wife had been seriously injured in a collision through the negligence of the railroad, and had settled their

claim in 1871 in return for the railroad's agreement to issue them free passes for life. Thirty-five years later, the Hepburn Act forbade the further issuance of passes (with exceptions which did not include the Mottleys), and prohibited any "different compensation" for transportation other than the published rates which were payable in money. The railroad refused to issue further passes; the Mottleys sued for and obtained from the Kentucky courts a decree requiring specific performance of the 1871 agreement; this Court reversed, on the ground that the 1906 statute was paramount and rendered the earlier contract unenforceable. The Court said (219 U. S. at 483, 485–486):

> After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established.
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> * * * * * *
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> We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts be-

> tween themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the Constitution will be readily perceived.

These principles are squarely applicable in the case at bar. The railroads cannot escape performance of their duties to the public as common carriers by pleading that such performance is precluded by the terms of an agreement with the Stock Yards Company. The New York Central's statutory obligations to the public are paramount and must prevail over any privately created arrangements arising from its contract of February 1, 1935, with the Stock Yards. Hence the railroads' duty to make direct delivery of livestock to Swift's siding may properly be enforced by the Commission's order.

Moreover, by the clear language of Section 2 of the Elkins Act (*infra*, pp. 89–90) the Stock Yards was subject to the jurisdiction of the Commission in the circumstances of this case, and was a proper party to the Commission's order. The Stock Yards falls squarely within the statutory language—"parties * * * affected by the * * * practice under consideration"—and within the authority granted the Commission thereby, viz., that "orders, and decrees may be

made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." Certainly if words are to be given their ordinary meaning, the Commission had power to make an order against the Stock Yards in order to enforce the provisions of the Interstate Commerce Act; and such decisions as there are under Section 2 of the Elkins Act confirm that view. See *United States* v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007 (C. C. E. D. Wis.); *Merchants' & Manuf. Traffic Ass'n* v. *United States*, 231 Fed. 292 (N. D. Cal.), reversed on other grounds, 242 U. S. 178; *United States* v. *Phillips Petroleum Co.*, 36 F. Supp. 480, 484 (D. Del.); *Glen Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 F. 2d 490 (C. C. A. 2), certiorari denied, 290 U. S. 697; cf. *Spencer Kellogg & Sons* v. *United States*, 20 F. 2d 459 (C. C. A. 2), certiorari denied, 275 U. S. 566. And there is no authority to the contrary.

D. *The Stock Yards' right, if any, to compensation from the New York Central for the use of its land has no bearing upon the validity of the Commission's order requiring the railroads to perform their duties to the public.*

The circumstance that the Stock Yards may have rights against the New York Central is wholly immaterial. We discuss some of those

possibilities under this heading. But even on the assumption that the New York Central comes under heavy liability to the Stock Yards by reason of compliance with the Commission's order, both still are required to comply with that order to the end that the policy of the Interstate Commerce Act may be carried out. The situation is the same as the relations between the Mottleys and the Louisville & Nashville after the latter could no longer lawfully issue annual passes. As this Court said (219 U. S. at 486),

> Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred is a question not before us, and we express no opinion on it.

So here: the rights and obligations of the New York Central and the Stock Yards *inter sese* are immaterial to any consideration of their duties in respect of the public, of Swift, and of other shippers. The railroads are required by law to render non-discriminatory service to the public and have been ordered to comply with specified provisions of the Interstate Commerce Act. This case in its present posture involves nothing more.

It may well be, of course, that some compensation is due the Stock Yards here. In the *Mottley* situation, it was later established that the party

contracting with the railroad was entitled to recovery in cash, notwithstanding free transportation had been rendered illegal. *New York Central R. R.* v. *Gray*, 239 U. S. 583. For the sake of completing the discussion, we pause briefly to consider what the Stock Yards' claim here might properly be.

It should be emphasized by way of preliminary that recognition of the full rights of ownership enjoyed by the Stock Yards by no means implies that it must necessarily thereby have the power of preventing performance of any common carrier's obligations of public service. Quite apart from its actual knowledge and express agreement providing for public use of Track 1619 by the railroad, the Stock Yards must be deemed to have recognized, when permitting use of its land for purposes of public service by a company known to be a regulated public utility, that such service must be conducted by the carrier in a manner consistent with the duties to the public imposed by applicable regulatory legislation, and to have assented to such use of its property. A landowner in the position of the Stock Yards may well be estopped from possessory remedies, and limited to a claim for compensation. Having assented to the unrestricted public use of its land by a railroad company having power of eminent domain, over a period extending from 1899 to 1935, during which it never sought to impose limitations on the railroad's right to transport all types of

traffic, and having permitted and encouraged the railroad to construct the track and expend large sums for the maintenance of that track and others located on Stock Yards' property, the Stock Yards would probably be confined to an action for damages in order to obtain such compensation as it may be entitled to for the use of its land. *Coe* v. *Columbus, P. & I. R. R. Co.*, 10 Ohio St. 372, 411–412; *Goodin* v. *Cincinnati & W. Canal Co.*, 18 Ohio St. 169, 179; *Pennsylvania Co.* v. *Platt*, 47 Ohio St. 366, 382; *Short* v. *Railway*, 27 Ohio Dec. 294, 303; *Roberts* v. *Northern Pacific Railroad Co.*, 158 U. S. 1, 10–11; *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260. In the case last cited this Court pointed out (171 U. S. at 271, 275)—

> There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts, may, by permitting a railroad company, without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes.
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> * * * * *

> This subject was fully considered by this court in the case of *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, where, upon the foregoing authorities and others, it was *held* that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages.

Though the case at bar does not require determination of the quantum of compensation, if any, in addition to what it is now receiving, to which the Stock Yards may be entitled, there is, as the Commission points out (R. 40; 266 I. C. C. at 67), no reason to assume that the Stock Yards is justified in claiming that reasonable compensation for the use of its Track 1619 is to be measured by the amount of charges it would collect if the livestock moving over Track 1619 were handled by it through its Stock Yard facilities. Certainly whatever compensation is due cannot be collected by what is, in very plain effect, a penalty on livestock. Indeed, it seems reasonable to assume that in a condemnation proceeding or *quantum valebat* action the Stock Yards would probably receive nothing, on the ground that the

free maintenance, not only of Track 1619 but of all other tracks located on Stock Yards property, constituted full and adequate compensation for the use of this track. Track 1619, moreover, was of substantial value in the operation of the stock yards. These considerations are particularly compelling since the maintenance of the other tracks, unless regarded as consideration for the use of Track 1619, would probably constitute an unlawful rebate or gift received by the Stock Yards from the carrier.[10]

Furthermore, a court considering the controversy between the Stock Yards and the carrier might well conclude that no compensation at all is required, for the reason that the terms upon which the Stock Yards has agreed to use by the railroad may constitute under state law a complete dedication to the public use. If, however, no such dedication has taken place, then it is clear that the railroad could obtain by condemnation such rights to use Track 1619 as it may require to perform its public duties.[11] Track 1619's devotion to railroad use was unrestricted in the 1899 and 1924 agreements, and the Stock Yards did not undertake to impose any restrictive provision un-

[10] The Commission has held that the maintenance by railroads, without compensation and at their own expense, of private plant tracks involves a violation of the Elkins Act and of Section 6 (7) of the Interstate Commerce Act. *Morrell & Co. Terminal Allowance*, 263 I. C. C. 69, 73; *Sioux City Switching Case*, 241 I. C. C. 623.

[11] The Stock Yards admits that the railroad could exercise eminent domain (R. 482).

til 1935. It may well be that the discriminatory restriction there sought to be imposed is void as against public policy, viz., the common law of carriers, the statutory system established by the Interstate Commerce Act, and the provisions of the Sherman Act directed against restraints of trade. In that event, if the prior inclusive dedication is given effect under state law, there would be no right to compensation at all; or, if the cancellation clause were held a bar to dedication, then the basis of ascertaining compensation would be the Stock Yards' inability to give effect to that clause. Whatever the determination made, however, the property rights of the Stock Yards, and the quantum or extent of the Stock Yards' rights against the railroad, would not have the slightest effect on the validity of the Commission's orders, any more than the property rights of the Mottleys could affect the validity of the statutory mandate directed against the Louisville & Nashville.

II. THE COMMISSION'S ORDER DOES NOT APPROPRIATE THE STOCK YARDS' PROPERTY FOR THE USE OF SWIFT

Just as appellees urge that the terms of the New York Central's trackage agreement with the Stock Yards relieve them from their duties under the Interstate Commerce Act to render nondiscriminatory service to shippers, so also they put forward the terms of that agreement as a basis for their contention that the Commission's order would have the effect of unconstitutionally depriving the Stock Yards of property rights.

It is not urged that the Stock Yards' property is taken in contravention of the fundamental law when commodities other than livestock pass over Track 1619. As we read appellees' argument, there is no taking of property when hundreds or thousands of cars loaded with salt, lumber, lard, hides, or even dressed beef are hauled to and from the shippers served by Spur No. 245 over the track in question. But the argument is that the Constitution is violated once the Commission requires that a single carload of livestock be similarly hauled, without payment of a yardage fee for services not rendered—and that argument was adopted and approved in the opinion below.

Solicitude for the protection of the Stock Yards as an owner of real estate appears to have engrossed so completely the attention of the district court that it completely lost sight of the paramount and controlling considerations involved in this case, viz., the nature and primacy of the public duties owed by the carriers. This distortion of focus led the court below to view the Commission's orders as "subjecting the private property of the Stock Yards Company to the use of Swift & Company" (R. 150), and as resulting in "appropriation of the Stock Yards Company's property for the use of Swift & Company" (R. 151).

The manifest error inherent in this approach lies in the failure to perceive that Track 1619 is devoted to the use of the New York Central and

not to the use of Swift & Company. This would be true even if Swift were the only industry served, instead of being merely one of seven industries dependent upon the New York Central for access to railroad transportation. That the New York Central would have the right to exercise the power of eminent domain, if necessary, in order to obtain the use of Track 1619, is clear. Section 8759 of the Ohio General Code confers the power, and the Stock Yards does not contest its existence (R. 482). And this Court and the Supreme Court of Ohio have repeatedly held that the use of a spur track connecting one or more industries with the main line of a railroad is a public and not a private use. *Union Lime Co.* v. *Chicago and Northwestern Ry. Co.*, 233 U. S. 211; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416; *Alton R. Co.* v. *Illinois Commission*, 305 U. S. 548; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 719; *Morgan Run Ry. Co.* v. *Public Utilities Comm.*, 98 Ohio St. 218; *Barlotti* v. *Public Utilities Comm.*, 103 Ohio St. 647.

The holdings in this Court were summarized in *Alton R. Co.* v. *Illinois Commission, supra*, 305 U. S. at 553–555, as follows:

> We have held: The uses for which a track was desired are not the less public because the motive which dictated its location was to reach a private industry, or because the proprietors of that industry

contributed to the cost. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 608. The State, consistently with the due process clause of the Fourteenth Amendment, may empower a common carrier by railroad to condemn a right-of-way for a spur leading to a single industry to be operated under obligations of public service open to all and devoted to public use. *Union Lime Co.* v. *Chicago & N. W. Ry. Co.*, 233 U. S. 211, 222. It may compel a railroad to extend a siding to an adjacent industry so as to provide additional trackage for public use and, if necessary, to condemn a right-of-way. *Chicago & N. W. Ry. Co.* v. *Ochs*, 249 U. S. 416, 419. For similar exertions of state power, see *Lake Erie & W. R. Co.* v. *Public Utilities Comm'n*, 249 U. S. 422, 424 and *Western & Atlantic Railroad* v. *Public Service Comm'n, supra.*

The decision of the state supreme court in this case must here be held conclusively to establish that under the constitution and laws of Illinois the order is valid. The decisions of this Court above cited leave no doubt as to the power of the State to require a common carrier by railroad to condemn rights-of-way for and to construct switch tracks like the one here involved. So far as concerns decision of this case, it matters not whether Illinois has exerted that power, for the track has been laid and is being used by the carrier. The required maintenance and operation are not beyond the scope of the carrier's undertaking to

serve the public. *Union Lime Co.* v. *Chicago & N. W. Ry. Co., supra. Chicago & N. W. Ry. Co.* v. *Ochs, supra.*

Assuming that the questions whether the switch track is open to public use and has become a part of the main line are so related to the constitutional issue here presented that the state court's determination of them is not binding upon this Court, we are of opinion that, upon the facts alleged in appellant's petition to the commission, the latter's unchallenged findings, and our decisions in similar cases, it is clear that in point of fact and law the switch track and any extensions of it that may be made are open to use to serve the public and constitute a part of the carrier's system.

Asserting that the duty to maintain a track such as that in question normally results from ownership, appellant earnestly insists that the order is shown to be unreasonable by the fact that rails and other materials purchased and owned by it when put into the track immediately cease to belong to it and become the property of the gas company which, appellant says, retains right of ownership in the track. But, in making that and similar arguments, appellant ignores the decisions in this case of the commission, the state supreme court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and across public thoroughfares; a track that has become a part of the main

line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used with extensions if any shall be made, to serve the public at large.

Appellant does not suggest that as against the owners of the land or those who paid for building the track, it is a trespasser or without right to continue to maintain and operate the track as required by the order. Nor does it say that, by exertion of the power of eminent domain, it may not successfully resist demands of claimants or owners for possession of any part of the land or of the track not owned by it. See *Mapes* v. *Vandalia Railroad Co.*, 238 Ill. 142, 145; 87 N. E. 393; *Black* v. *Chicago, B. & Q. R. Co.*, 243 Ill. 534, 539; 90 N. E. 1075; *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 11; *Northern Pacific R. Co.* v. *Smith*, 171 U. S. 260, 271.

The court below undertook to distinguish the *Alton* case on the ground that there the railroad did not suggest that it was a trespasser, whereas here the New York Central does (R. 150–151). But this overlooks completely the last paragraph just quoted, regarding the railroad's power of eminent domain which enables it to resist demands of claimants for possession of any part of the land or the track not owned by the carrier.

Moreover, it is clear as a matter of Ohio law

that a spur track, even though not owned by the railroad, is devoted to public and not private use where it is operated in conjunction with a railroad's own line for the transportation of freight. *Morgan Run Railway Co.* v. *Public Utilities Comm.*, 93 Ohio St. 218; *Barlatti* v. *Public Utilities Comm.*, 103 Ohio St. 647, both *supra*.

The *Morgan Run* case is closely analogous to the case at bar. The railroad there was a short line which operated from a junction with the Wheeling & Lake Erie Railway to the mines of the Morgan Run Coal & Mining Company. The carrier claimed, and the court assumed for the purposes of its decision, that a portion of the track was owned by, and was located on the property of the coal company. The railroad had operated the entire line of road, and published tariffs covering points located on the portion of track owned by the coal company. The complainants, John and Peter Ingham, owned a mine near the portion of the line which was located on the land of the coal company. When the Ingham mine chose to sell its coal to purchasers other than the Morgan Run Coal & Mining Company, the railroad refused to place cars for loading at the point previously used for that purpose by the Ingham mine, and abandoned service to that point without any authority from the Public Utilities Commission for such abandonment.

On the hearing the commission found that the railway company was operating as

> a common carrier the entire line of railroad owned by it and the coal and mining company, either or both, extending from the point of connection with the tracks of the Wheeling & Lake Erie Railway Company, at a point east of Coshocton known as Morgan Run, some three miles to the mines of the coal and mining company, and ordered it to furnish service as a common carrier and without discrimination to the complainants, and ordered it to connect and operate with the tracks now maintained the track abandoned without the consent of the commission, or provide at a point adjacent to its main track, near the point where the tracks cross the public highway at common grade, a suitable and adequate loading platform in lieu of the facility heretofore maintained adjacent to such abandoned track, or provide some other suitable means for the loading of complainant's coal, and that it move said cars, from time to time, to the junction of the Wheeling & Lake Erie railway. (98 Ohio St. at 222–223.)

This order of the Commission was affirmed by the court, which held that the railroad must comply with its statutory and common law obligation to operate without discrimination between shippers. In view of the marked factual similarity between this case and the one at bar, and the like similarity between the state statutes and the Interstate Commerce Act (R. 37), and also because of the authority of the decision as an exposition of the

Ohio law, we feel warranted in quoting from the opinion at some length.

The Supreme Court of Ohio said (98 Ohio St. at 226-229, 231-232):

> It is contended that the order of the commission requires the railway company to furnish facilities and operate a line on property not owned by it; that the commission has no jurisdiction to require one who is not a common carrier to act as such; and that the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction.
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> Section 523, General Code, provides that the commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over tracks of such railroad. Section 8990, General Code, requires all railroad companies to extend to all persons receiving and shipping freight the same and equal opportunities. This statute is declaratory of the common law on the subject.
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> It is contended that the order of the commission in this case in effect requires the railway company to extend its line over property which it does not own, to purchase equipment which it is unable to buy, and forces the coal company to grant the use

of its land to the railway company for the benefit of a competitor.

* * * * * * *

* * * assuming, without deciding, that the coal company was the owner of the portion of the line which it claims, we are still confronted with the fact that the railway company insists on a plan of procedure which will result in the operation, exclusively for the coal company's benefit, of all that portion of the line which is concededly owned by the railway company. As a common carrier, subject to the control of the state and its commission, the railway company denies to complainants the benefit of the provisions of Section 523, General Code, above set out. It must be noted that by the terms of that section it is not necessary that the railway company own the line. It is sufficient to give the commission jurisdiction that private tracks are used in common with the line of the railway company.

* * * * * *

Again assuming, for the purposes of this case, that the coal company owns the portion of the railroad claimed by it, and that the coal company itself made up the deficiency in the cost of operating the railroad, still the railway company has no right to make the discrimination found by the commission to be made. It is not a question as to the right of the railway company to take and use the lands or property of the

coal company without consent and without compensation. It is a question as to the right of a corporation, having all the rights and subject to all of the duties and obligations of a common carrier, to operate its own line for the exclusive benefit of the coal company, and to use the coal company's line over the coal company's property with its consent to transport its coal to and over the railway company's line, all to the exclusion of the general public or those who have the right to equal shipping privileges.

We therefore hold that as long as the railway company operates any portion of the railroad in question, it must do so without discrimination in favor of any shipper.

This is a small and unimportant railroad, whose operations are very limited, but the questions that are brought to the court for consideration are not limited. They affect every common carrier. If this company may arbitrarily select those whom it will serve, any company may do so.

The order of the Commission was modified so as to be effective over the line claimed by the coal company as long as it was used by the railway for the transportation of freight, and, as thus modified, it was affirmed. In a subsequent proceeding (*State ex rel. McGhee* v. *Morgan Run Ry. Co.*, 99 Ohio St. 439), the railway was ordered to cease to permit the coal company or any other person or corporation to operate its line of railway in any manner, or to move cars or equipment

thereon, until such other company should have been duly authorized under Ohio law to act as a common carrier railroad company.

The court below attempted to distinguish the first *Morgan Run* case on the ground that the railroad and the coal company were under common ownership and conspired together for the purpose of compelling the complainants to sell their coal to them at the price they would name (R. 151). But this is a distinction without a difference, which disregards additionally the subsequent proceeding reported in 99 Ohio State. And, in any event, the distinction suggested has no relevance to the railroad's duty to serve all shippers without discrimination. The reasons which may have motivated the carrier in discriminating are altogether immaterial. Discrimination, or other violations of a common carrier's obligations to the public, are unlawful without regard to the motives or reasons which may have produced them. It is not necessary, in order to justify action by a regulatory agency directed against such violations of common-carrier obligations, to show that they resulted from conspiracy with a shipper under common control. A railroad entirely independent, having no connection with shipper interests, and acting solely in pursuit of its own individual policy, may obviously be guilty of undue preference or other violations of its duties to the public as a common carrier.

The distinction advanced by the court below is untenable, and the *Morgan Run* case remains a highly persuasive precedent in the case at bar.[12]

Barlotti v. *Public Utilities Comm.*, 103 Ohio St. 647, is likewise a forceful expression of the law of Ohio on this subject. The carrier in that case, the Dillonvale & Smithfield Railroad Company, was lessor of a line about 4 miles long from Dillonvale to Bradley, where there was located a coal mine owned by the corporation which held the railroad company's stock. The branch line in question was operated by the Wheeling & Lake Erie Railroad Company as lessee, and was used solely to transport the coal company's product to market and to carry its merchandise to the company store in Bradley, a town of about 700 population with several stores, and the usual business, industrial and social activities of such a place. A full line of rates was established over the railroad to and from Bradley, but service was refused to other shippers than the coal company. The court held that such discrimination was prohibited by Section 567 of the General Code and that the company should be ordered to furnish

[12] The district court also sought to minimize the weight of the first *Morgan Run* case on the ground that it arose out of state statutes (R. 150). But the state statutes embody the same rules as the Interstate Commerce Act, and both declare broadly the common law rules applicable to common carriers. The *Morgan Run* decision, far from being weakened by the circumstance relied on, only serves to emphasize the departure of the ruling below from accepted principles of law.

reasonably adequate shipping facilities to the public without discrimination. It said (103 Ohio St. at 659):

> If the shipping business along the line of this short road is not sufficient to justify its maintenance and operation as a common carrier, it can be abandoned as such upon proper steps being taken. But having been constructed and operated by companies organized as common carriers under the laws of the state they must serve the public until such steps are taken.
>
> The line involved in this proceeding is small and its business not important, but the questions submitted to the court affect common carriers generally. If these defendant companies may arbitrarily determine what service they will render, and to whom, any company may do so.

The foregoing authorities, state and federal alike, clearly establish that the Commission's order in this case, which requires the New York Central to render non-discriminatory service to Swift, is not one subjecting the property of the Stock Yards to the private use of Swift, but that, quite to the contrary, the New York Central's service over Track 1619 would constitute a public use of that track by the railroad for common carrier purposes. As this Court remarked many years ago, "Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns

it." *Olcott* v. *The Supervisors*, 16 Wall. 678, 695. It follows that the holding below, to the effect that the Commission's order amounted to "appropriation of the Stock Yards Company's property for the use of Swift & Company," is palpably and plainly wrong.

III. IN ANY EVENT, THE COMMISSION'S ORDER SIMPLY REQUIRES THE RAILROADS TO DELIVER INTERSTATE LIVESTOCK TO SWIFT'S TRACK, AND DOES NOT NECESSARILY INVOLVE ANY USE OF TRACK 1619

Proper analysis of the Commission's order would have shown the court below that what the Commission commanded required no action on the part of the Stock Yards, and did not even necessarily involve any use of Track 1619.

The Commission's order, quoted above, p. 10, directs the defendants (1) to cease and desist from refusing to deliver to Swift's side track interstate shipments of livestock carried over their lines and consigned thereto, and (2) to establish and put in force tariff schedules for such delivery (R. 66).[11] The order does not in terms require

[11] The latter provision of the order presumably relates to livestock traffic switched by the New York Central after line-haul transportation by other carriers, and contemplates re-establishment of New York Central's switching charges on such traffic and their absorption by the line-haul carriers, so that shipments may be delivered to Swift's side track at the Cleveland line-haul rates. In so far as traffic reaching Cleveland over the New York Central's own line is concerned, there has never been any abrogation of the tariff provision for delivery to Swift's side track at the Cleveland line-haul rates.

any action whatsoever by the Stock Yards; and even with respect to the action required of the railroads, the Commission's order could be complied with by the carriers without the use of Track 1619 at all, if they were prepared to substitute some other method of serving the Swift plant and of making direct deliveries of livestock thereto without utilizing the track owned by the Stock Yards. As a practical matter, the seven industries served by that track are now dependent upon it for access to railroad transportation. Regardless of the effect which the Commission's order may under these circumstances have upon the bargaining position of the railroads, clearly nothing in the trackage contract would prevent the carriers from complying with the Commission's order by furnishing the service required.

How and upon what terms the trackage rights needed for the performance of proper service are obtained is a matter of railroad responsibility and managerial discretion. Whether suitable facilities are procured by negotiation or by condemnation, or whether the compensation due the owner be great or small, are matters with which neither the shipper nor the Commission is here concerned. Any issues in dispute between the carrier and the landowner regarding the measure of compensation constitute a controversy quite separate from the dispute between Swift and the railroads which was decided by the Commission,

and this is equally true whether the carrier negotiates, whether it condemns, or whether it undertakes new construction. In any event, this Court has made it plain, not only that a carrier may not excuse discriminatory service on the ground of inadequate facilities (*Mitchell* v. *United States*, 313 U. S. 80, 90, 96; *United States* v. *Pennsylvania R. Co.*, 266 U. S. 191, 198–199), but also that the performance of public service by common carriers is a matter of paramount public concern which must not be interfered with because of the pendency of controversies between landlord and tenant in respect of compensation for property used in railroad service (*Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134). Consequently, whether the present difference between the New York Central and the Stock Yards over the compensation due the latter for the passage of livestock over Track 1619 is resolved by amicable negotiation, by litigation, by condemnation, or by the Gordian stroke of new construction, in any contingency neither the existence of the controversy nor the expense which may be occasioned in disposing of it justify the railroad in refusing nondiscriminatory service to Swift as the Interstate Commerce Act requires.

Whether the Stock Yards may now terminate altogether the use of Track 1619 is a matter of state law, whether—succinctly stated—devotion

to a public use over a period of nearly half a century (1899–1948) falls short of ripening into dedication to a public use because of the reservation of a right to cancel. We shall not undertake to resolve that question here, but we believe that some consideration of the right of the Stock Yards, if any, to withdraw Track 1619 from further use may be appropriate.

Throughout the hearings before the Commission, the Stock Yards consistently asserted that it did not desire to prevent use of Track 1619 by the railroad for making direct deliveries to the seven industries served thereby; it stated that it merely sought what it regarded as fair compensation for such use, viz., the collection of a yardage fee on all livestock passing over Track 1619, the same as though the stock had actually passed through the yards. In paragraph V of its answer filed before the Commission, the Stock Yards said:

> Admits that it is the owner of a certain track or tracks over which defendant railroads move cars in making delivery to complainant's plant at Cleveland, Ohio; but denies that it notified the railroad defendants that it would no longer permit the use of said railroad track or tracks by the railroad defendants in connection with the delivery of livestock to complainant's plant in Cleveland, Ohio; * * *

In its brief before the Commission, dated June 29, 1942, it said (pp. 4–5):

> Here again the complainant alleged but did not prove that the Stock Yards Company had notified the railroads that it would no longer permit the use of its tracks in effecting delivery of livestock to complainant's plant. The Stock Yards Company specifically denied that it gave such notice.
>
> * * * * *
>
> So far as the Stock Yards Company is concerned the tracks have at all times been available for the use in question. Their non-use results entirely from the choice of the railroads.

The same position was adhered to by the Stock Yards' president, Baker, in his testimony before the examiner (R. 303), and by the Stock Yards' counsel in his argument before the full Commission (R. 481–482, 483, 484).

It was not until after the filing of the Commission's report and the entry of its order that the Stock Yards, in November 1946, gave notice to the New York Central of the termination of the agreement covering Track 1619 (Exh. E, R. 54–56). That notice was in terms predicated upon the Commission's decision in the present case, and, significantly enough, was dated only five days prior to the filing of the railroads' complaint herein.

At the trial, this notice of termination was

offered in evidence by the Stock Yards, but excluded, as something that occurred after the date of the proceedings before the Commission (R. 142). Later, after the court set aside the Commission's order, the Stock Yards in effect withdrew the notice, and we are advised that, ever since the date of the judgment below, Track 1619 has been used for the transportation of commodities other than livestock, and that it is now so used. Whether, in the event of a reversal by this Court, the Stock Yards would again serve notice of cancellation, is of course only matter of conjecture.

But, whether or not the Stock Yards has a right to withdraw use of Track 1619 altogether—and that, as the Commission twice indicated (R. 38, 40; 266 I. C. C. at 65, 67), was a point on which it did not pass, we think it clear that the right to withdraw altogether does not justify a continuance of discrimination.

The Stock Yards maintained throughout that it was ready and willing to permit livestock to pass over Track 1619, provided such livestock paid the yardage fees which would be due in the event such stock were unloaded into the yards. The Stock Yards does not insist on unloading the livestock; it is willing to let the livestock pass, provided that cargo pays the featherbedding toll demanded. Denied the right thus to levy toll, the Stock Yards now threatens to withdraw the use of its track for all commodities.

We think that the right to withdraw, assuming it exists, does not include the right thus to condition passage. Otherwise stated, a power to discriminate is not a lesser included right within the power to withdraw altogether.[14] As long as Track 1619 is part of a railway, it must be operated as a railway, free from discrimination—which was the principal end aimed at by the Interstate Commerce Act. *New York* v. *United States*, 331 U. S. 284, 29[illegible]

But it does not follow from the assumption that the Stock Yards is free to terminate the use of Track 1619 *vis-à-vis* the New York Central that the New York Central has a similar right of abandonment *vis-à-vis* the public. Regardless of whether Spur No. 245 falls within the exception of Section 1 (22) of the Interstate Commerce Act (*infra*, p. 84), so that jurisdiction to permit abandonment is governed by the law of Ohio rather than by the Interstate Commerce Act (cf. *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266; *United States* v. *Idaho*, 298 U. S. 105), it is undisputed that abandonment has not been authorized under either law, and that, in fact, there has been no abandonment. And if the rail-

[14] We think that Commissioner Splawn accordingly fell into error when he said (R. 80: 266 I. C. C. at 77), "There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use. If it has such authority over the track, it seems to me that it has the right to restrict its use."

road may not abandon, then, absent a satisfactory negotiation with the Stock Yards, it must condemn. It has as we have pointed out (*supra*, pp. 49, 52), ample power to do so, and it may not, as we have likewise pointed out (*supra*, p. 66), justify its continuance of discriminatory practices by establishing its inability otherwise to obtain the use of Track 1619.

It is pertinent to point out, moreover, that to permit abandonment here would open the door wide to precisely the kind of discriminatory practices which congressional legislation over a period of more than sixty years has sought to extirpate root and branch. See *New York* v. *United States*, 331 U. S. 284, 296. The present case presents a situation where the Commission, on undisputed evidence, has found violations of law—of Section 3 (1), which forbids discrimination among shippers; of Section 1 (6), which condemns unreasonable practices; and of Section 1 (9), which requires railroads to operate switch connections with private sidetracks. We demonstrated above how Section 1 (3) (a) makes ownership of any part of a railway system irrelevant to the duty imposed on the carrier to operate its railway in accordance with law; and we demonstrated further that the carrier could not by contract relieve itself of that duty. Here the proposition would be that the carrier may, by informal abandonment, relieve itself from compliance with an order of the Commission requiring performance of the

carrier's duty. If that proposition were once accepted, then obviously the Interstate Commerce Act in respect of duties under Section 1 (9) would be well-nigh nullified. Compare *Cleveland, etc., Ry.* v. *United States*, 275 U. S. 404, which holds that the exception in Section 1 (22) does not destroy the Commission's power under Section 1 (9). But, as we have already indicated, this discussion of abandonment is a digression undertaken solely for the sake of completeness. As long as the present proceeding was before the Commission, the Stock Yards never undertook to cancel the New York Central's right to use Track 1619, and the New York Central never then or since has ever suggested an abandonment of Spur No. 245.

The shipper here, Swift, connected its private track with a portion of New York Central track. That being so, it is entirely immaterial that Swift, for reasons of its own, chose not to construct a spur to connect with the New York Central's main line (R. 31; 266 I. C. C. at 58). Section 1 (9) of the Interstate Commerce Act is not limited to switch connections with main lines; it speaks of a "railroad," and that term, see Section 1 (3) (a), includes the entire system. That being so, the state of the record title to Track 1619, or the contractual arrangements respecting its operation, or the fact that there are such arrangements, is each quite as immaterial to the shipper as the circumstance that the New York Central

is lessee rather than fee owner of the Big Four system, or that there are three, two, one or no mortgages on that system, or that the appellee Erie Railroad Company was in reorganization proceedings (see R. 179) while this proceeding was before the Commission, or that a portion of the New York Central's track fifty miles distant from the Cleveland stockyard district is subject to a possibility of reverter in the undetermined heirs of some local worthy now deceased. The shipper's concern ends when it has built the private siding to the railroad's line. *Cleveland, Etc., Ry.* v. *United States*, 275 U .S. 404. Thereafter, the railroad must build the switch, and, once that is done, both carrier and shipper are subject to the provisions of the Interstate Commerce Act. Swift here is no more bound to look to the title to Track 1619, and is no more bound by knowledge of any infirmity in that title, than it is concerned with the existence of a similar arrangement anywhere along the line of the system to which its private track connects.

Nor is it material that the landowner here is "a stockyard under the provisions of the Packers and Stockyards Act" and that for over twenty-five years "it has operated under the jurisdiction of the Secretary of Agriculture" (R. 148). The Commission is not undertaking to regulate the landowner or its business *qua* landowner, it is striking down discriminatory practices engaged in by rail carriers. Its powers are not curtailed by

the circumstance that the owner of a portion of the track operated by the carrier happens to be engaged in an activity subject to regulatory supervision by another agency of government. If Track 1619 were owned by a broadcasting company, subject to regulation only by the Federal Communications Commission, and that company imposed a discriminatory rate on newspapers passing over the track, the Interstate Commerce Commission's power would not be curtailed. For the latter Commission deals only with transportation, and its order in the present case concerned only the nondiscriminatory transportation of a particular commodity to a shipper whose private track had been connected for over a generation to the system of a common carrier by rail.

The Commission's order here under scrutiny merely requires that the carriers cease and desist from the violations of the Interstate Commerce Act which the Commission found to exist. The carriers are free to perform their obligations in any appropriate manner that they see fit. They are also at liberty to relieve themselves from their obligations to serve Swift and other industries connected through Track 1619 by taking proper steps legally to abandon the operation of that portion of the railroad system. But until such formal abandonment the Commission's order requires that the transportation service be furnished without discrimination or other specified

violations of applicable provisions of the Interstate Commerce Act.

Whatever may be the practical compulsion on the carrier to use Track 1619 belonging to the Stock Yard in order to carry out its common carrier obligations to the public, the Commission's order does not constitute an appropriation of Stock Yards' property. *A fortiori* it is not an appropriation of Stock Yards' property for the private use of Swift, as the court below held.

Consequently, it is submitted that whatever may be the right of the Stock Yards to fair, adequate, and just compensation for the use of its land, that right has no bearing upon the validity of the Commission's order. The Commission's order effects no unconstitutional taking of property from the Stock Yards; it merely requires the railroads to perform their duties to the public as common carriers. It is the responsibility of the New York Central to take such steps as may be necessary to enable it to furnish the service it is required to perform. Swift and other affected shippers are not concerned with any bargain the railroad may see fit to make with the Stock Yards. Whatever claims the Stock Yards may see fit to assert, in order to secure just compensation in the absence of agreement, may be presented for appropriate consideration in a suitable forum. Such claims were not determined in the adjudication made by the Commission in the order involved in the case at bar.

It necessarily follows that the Commission's order which requires the railroads to perform their duties to the public as common carriers by making direct delivery of livestock to the Swift sidetrack and by desisting from the violations of Sections 3 (1), 1 (6), and 1 (9) which were found by the Commission to exist, is valid, and that it should not have been set aside.

CONCLUSION

The ruling of the district court sanctions the continued enforcement of a private contractual arrangement which obstructs the free flow of interstate commerce by the levy of a discriminatory toll on a single commodity. The judgment of the district court should therefore be reversed, with directions to dismiss the complaints.

Respectfully submitted.

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JANUARY 1948.

APPENDIX A

Pertinent Statutory Provisions

1. National transportation policy (act of sept. 18, 1940, 54 stat. 898)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

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2. INTERSTATE COMMERCE ACT, AS AMENDED, PART I (40 U. S. C. 1, ET SEQ.).

SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

* * * * * *

(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier". The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied,

for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

* * * * *

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) (a) All charges made for any service rendered or to be rendered in the transportation of

passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

* * * * *

(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall

construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

* * * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of rail-

road, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or sidetracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be

heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon

conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilites for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

SEC. 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

SEC. 12. (1) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this part, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in

which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

* * * * *

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of

opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(13) If the owner of property transported under this part directly or indirectly ren-

ders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

* * * * * *

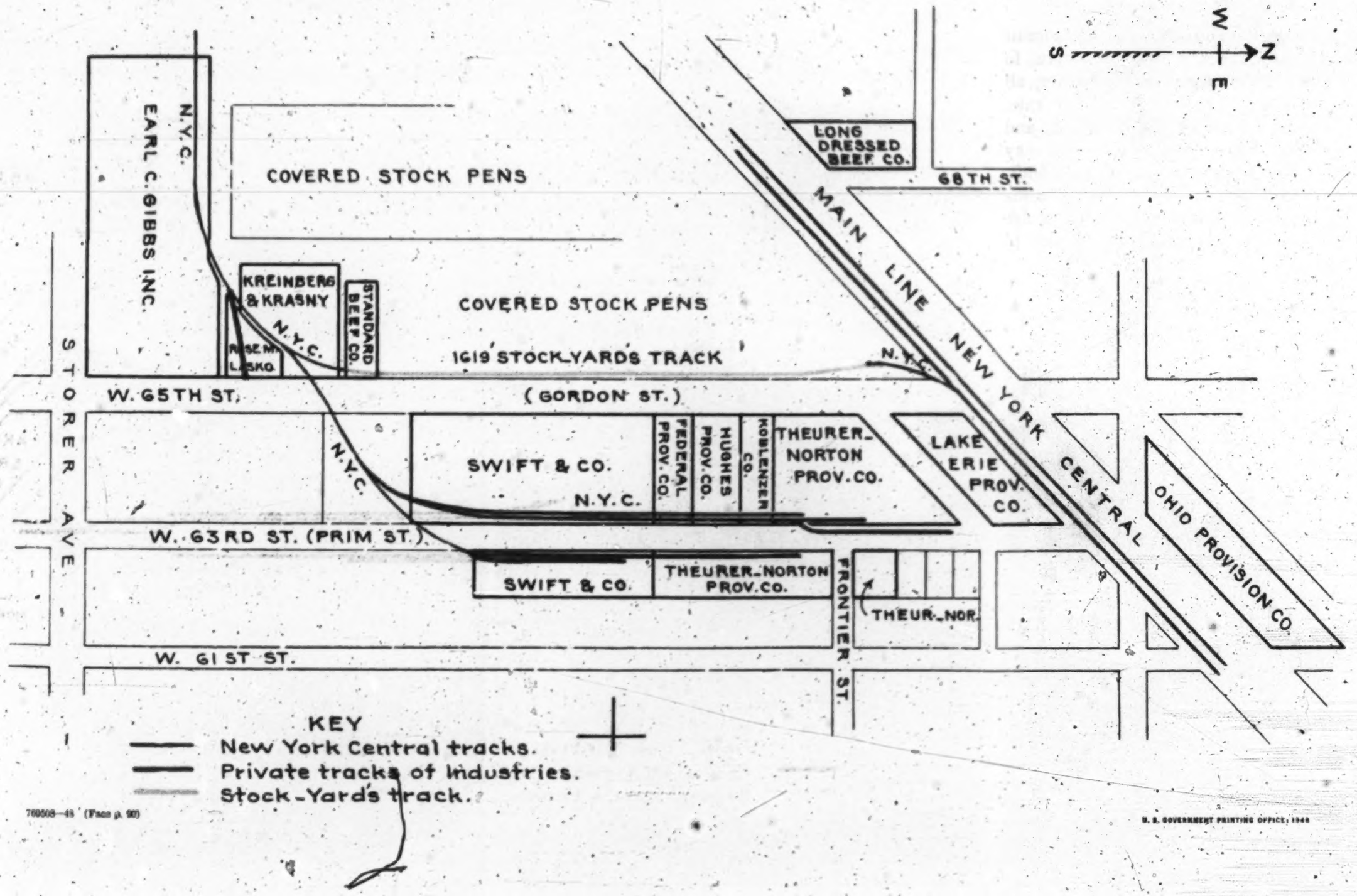
SEC. 16. (7) It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this part shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

3. SECTION 2 OF THE ELKINS ACT (49 U. S. C. 42)

That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Com-

mission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 223

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SWIFT & COMPANY,
Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLANT, SWIFT & COMPANY.

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INDEX.

	PAGE
Preliminary Explanations	1
Terms and Symbols Used Herein	1
Appendix	2
Reference to Official Report of Opinion of Lower Court and Report of Interstate Commerce Commission	3
Concise Statement of Grounds on Which Jurisdiction of This Court Is Invoked	3
Question To Be Decided	5
Statement of the Case	5
Specification of Assigned Errors Intended To Be Urged	10
Argument	11
I. The District Court Erred in Finding That Track 1619 Is Not Part of the New York Central Railroad Within the Meaning of Section 1 (3) (a) of the Act and Is Not as Much Subject to the Act and Its Provisions as Any Other Part of the Railroad or Facilities of the New York Central	11
Scope and nature of Interstate Commerce Act	13
Extent of property, equipment, and facilities which Congress subjected to regulation under Act	14
Commission's finding binding on lower court	15
Commission's finding supported by evidence	18
Other decisions by courts and the Commission demonstrate correctness of Commission's findings	19

Fact that track 1619 is operated under lease is not controlling 27

Consequences of theory relied on by District Court 28

II. The District Court Erred in Finding and Concluding that No Discrimination Against Swift & Company or Preference of Its Competitors Exists in Violation of Section 3 (1) of the Act; and in Finding and Concluding that the Commission's Order Would, Itself, Prefer Swift & Company... 29

Whether or not a particular preference or discrimination is undue or unreasonable is a question for determination by the Commission which will not be set aside by the courts if supported by substantial evidence..... 33

Length of track, distances, and locations furnish no support to District Court's finding..... 36

III. The District Court Erred in Concluding that No Legal Basis Exists for a Finding of Any Violation of Section 1 (6) of the Act..... 38

Commission's finding binding on lower court..... 40

Finding amply supported by evidence..... 44

IV. The District Court Erred in Concluding that No Legal Basis Exists for a Finding of a Violation of Section 1 (9) of the Act..... 45

V. The District Court Erred in Finding and Concluding that the Order of the Commission Would Constitute an Appropriation of Property to the Use of Swift & Company..... 51

VI. The Cleveland Union Stock Yards Company Was a Proper Defendant in the Proceeding Before the

Commission and Is Bound by the Commission's Order in that Case to the Same Extent as the Railroad Defendants Therein 55

Statutory provision under which Stock Yards Company Was Made a Defendant 56

Conclusion 61

Appendix "A":

Interstate Commerce Act, as amended, Part I (49 U. S. C. A.):

Section 1:

Par. (1) (a) 63

Par. (3) (a) 63

Par. (4) 64

Par. (5) (a) 64

Par. (6) 65

Par. (9) 65

Par. (18) 66

Par. (19) 67

Par. (20) 67

Par. (21) 68

Par. (22) 68

Section 2 69

Section 3 (1) 69

Section 6 (7) 70

Section 15 (1) 70

Section 16:

Par. (7) 71

Par. (8) 71

Elkins Act, Section 2 (49 U. S. C. A. § 42) 72

Appendix "B"—Sketch taken from exhibit 12 ..... after page 72

Appendix "C"—Commission's report in Dkt. No. 28714 ..... after page 72

CASES CITED.

Akron, C. & Y. R. Co. v. United States, 261 U. S. 184, 67 L. ed. 605 41

Allowances for Privately Owned Tank Cars, 258 I. C. C. 371 60

Alton R. Co. v. Illinois Commerce Commission, 305 U. S. 548, 83 L. ed. 344 20

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681 51

Ayres (F. C.) Mercantile Co. v. Union Pac. R. Co., 16 F. (2d) 395 23

Baltimore & O. R. Co. v. United States, 71 F. Supp. 499 3

Board of Trade v. United States, 314 U. S. 534, 86 L. ed. 432 36

Chicago, I. & L. R. Co. v. United States, 270 U. S. 287, 70 L. ed. 590 17

Chicago, R. I. & P. R. Co. v. United States, 274 U. S. 29, 71 L. ed. 911 42

Cleveland, C. C. & St. L. R. Co. v. United States, 275 U. S. 404, 72 L. ed. 338 45

Cleveland Union Stock Yards Co. v. United States, 71 F. Supp. 499 3

El Dorado Oil Works v. United States, 328 U. S. 12, 90 L. ed. 1053 60

Florida v. United States, 282 U. S. 194, 75 L. ed. 291 .. 18

General Amer. T. Car. Corp. v. El Dorado Term. Co., 308 U. S. 422, 84 L. ed. 361 59

Glens Falls Portland C. Co. v. Delaware & Hudson Co., 66 F. (2d) 490 57

Huerfano Coal Co. v. C. & S. E. R. R. Co., 28 I. C. C. 502 25
I. & S. W. Ry. Co. v. C., B. & Q. R. R. Co., 42 I. C. C. 389 25
Interstate Com. Com. v. Hoboken Mfrs., 320 U. S. 368, 88 L. ed. 107 16
Interstate Commerce Commission v. Jersey City, 322 U. S. 503, 88 L. ed. 1420 44
Interstate Com. Com. v. Union P. R. Co., 222 U. S. 541, 56 L. ed. 308 18
Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297 13
Manufacturers R. Co. v. United States, 246 U. S. 457, 62 L. ed. 831 34
Merchants Warehouse Co. v. United States, 283 U. S. 501, 75 L. ed. 1227 42
Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U. S. 356, 88 L. ed. 96 13
Mississippi Valley Barge L. Co. v. United States, 292 U. S. 282, 78 L. ed. 1260 43
Morgan Run Ry. Co. v. Public Utilities Commission, 98 O. S. 218; 120 N. E. 295 22
Morrell (John) & Co. Terminal Allowance, 263 I. C. C. 69 26
Nashville, C. & St. L. R. Co. v. Tennessee, 262 U. S. 318, 67 L. ed. 999 34
New York v. United States, ... U. S. ....., 91 L. ed. 1083 13
O'Keefe v. United States, 240 U. S. 294, 60 L. ed. 651 .. 13
Rochester Telephone Corp. v. United States, 307 U. S. 125, 83 L. ed. 1147 43

Sioux City Term. Ry. Switching, 241 I. C. C. 53..... 26

Spencer Kellogg & Sons v. United States, 20 F. (2d) 459; 275 U. S. 566, 72 L. ed. 429..... 58

St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., 26 I. C. C. 226..... 25

Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55.. .....3, 11, 12, 29, 37, 45, 46, 47

Union Lime Co. v. Chicago & N. W. R. Co., 233 U. S. 211, 58 L. ed. 924.....19, 49, 54

United States v. American S. & T. Plate Co., 301 U. S. 402, 81 L. ed. 1186..... 15

United States v. Berwind-White Coal Min. Co., 274 U. S. 564, 71 L. ed. 1204.....18, 42

United States v. Chicago Heights Trucking Co., 310 U. S. 344, 84 L. ed. 1243..... 35

United States v. Louisville & N. R. Co., 235 U. S. 314, 59 L. ed. 245..... 33

United States v. Milwaukee Refrigerator T. Co., 145 F. 1007 57

United States v. New River Co., 265 U. S. 533, 68 L. ed. 1165 .....17, 41

United States v. Pennsylvania R. Co., 323 U. S. 612, 89 L. ed. 499..... 13

United States v. Phillips Petroleum Co., 36 F. Supp. 480 57

United States v. Wabash R. Co., 321 U. S. 403, 88 L. ed. 827 17

Virginian R. Co. v. United States, 272 U. S. 658, 71 L. ed. 463 .....18, 34

Statutes Cited.

Interstate Commerce Act, Part I (U. S. C. Tit. 49, § 1, et seq.):

Section 1:

Par. (1) (a) 14, 60
Par. (3) (a) 3, 11, 14, 15, 16, 18, 27, 40, 41
Par. (4) 38
Par. (5) (a) 38, 40, 41
Par. (6) 3, 38, 39, 40, 41, 44, 45
Par. (9) 3, 45, 47, 48, 51
Section 3 (1) 3, 29, 31, 32, 36, 38, 47, 48
Section 6 (7) 3
Section 15 (1) 40
Elkins Act, Section 2 (49 U. S. C. A. § 42) 56
Judicial Code and Judiciary (U. S. C. A. Tit. 28):
Section 41 (28) 4
Section 44 4
Section 45a 4
Section 47 4
Section 47a 4
Section 345 4

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLANT, SWIFT & COMPANY.

PRELIMINARY EXPLANATIONS.

Terms and Symbols Used Herein.

R. .... refers to pages of the printed transcript of record in this Court.

Ex. .... refers to exhibits as numbered in proceedings before the Interstate Commerce Commission in its docket No. 28714.

The New York Central Railroad Company is referred to herein as *New York Central*, and such reference will also include its predecessor, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

The Cleveland Union Stock Yards Company will be referred to herein as the *Stock Yards*.

The Act refers to the Interstate Commerce Act.

Commission refers to the Interstate Commerce Commission.

Appendix.

For the convenience of the court, we have included certain matters in an appendix hereto.

Appendix "A" includes: (1) the sections of part I of the Interstate Commerce Act upon which the Commission based its decision; and (2) section 2 of the Elkins Act.

Appendix "B" is a sketch taken from exhibit 12, showing approximately the track layout and the location of the various industries involved, including the Swift plant.

Appendix "C" is a photographic reproduction of a printed copy of the Commission's decision.

REFERENCE TO OFFICIAL REPORT OF OPINION OF LOWER COURT AND REPORT OF INTERSTATE COMMERCE COMMISSION.

1. Reference to official report of the opinion of the lower court is as follows:

Baltimore & O. R. Co., et al. v. United States, et al.; and *Cleveland Union Stock Yards Co. v. United States, et al.*, 71 F. Supp. 499.

2. Reference to the report of the Interstate Commerce Commission is as follows:

Swift & Co. v. Baltimore & O. R. Co., 266 I. C. C. 55.

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The grounds on which the jurisdiction of this court is invoked were set forth with particularity in appellants' jurisdictional statement under rule 12 of the Revised Rules of this court. Briefly stated, these grounds are as follows:

In its docket No. 28714, *Swift & Co. v. Baltimore & O. R. Co., et al.*, the Interstate Commerce Commission, on May 3, 1946, issued its report and order, making findings under and construing sections (among others) 1(3)(a); 1(6); 1(9); and 3(1) of the Interstate Commerce Act; and ordered the defendants therein to cease and desist from refusing to deliver interstate shipments of live stock to the sidetrack of Swift & Company, the complainant therein; and ordered defendants to publish appropriate schedules providing for such delivery as required by section 6 of said

act. The effective date of the Commission's order has been postponed from time to time, pending the filing and final disposition of actions in court attacking the validity of the order. Various defendants against which the order ran filed two separate actions in the District Court of the United States for the Northern District of Ohio, Eastern Division, in which they asked that the Commission's order be held illegal and void and that it be suspended, set aside, vacated, cancelled, and held for naught, and that enforcement thereof be perpetually restrained and enjoined. Swift & Company intervened under U. S. C. title 28, section 45a. The different court actions were consolidated for trial and heard by a special three-judge court as required by law. That court, in its order and judgment, perpetually enjoined enforcement and vacated, set aside, and annulled the Commission's order.

As was pointed out in our jurisdictional statement under this court's rule 12 and as this court will readily see when it reads other portions of these briefs, the questions presented by this appeal are substantial and involve the interpretation and application of a number of sections of the Interstate Commerce Act as well as a section of the Elkins Act.

It is respectfully submitted that this appeal from the aforesaid order of the United States District Court was properly filed and that the jurisdiction of this court is properly invoked under U. S. C. title 28, section 47a, 41(28), 44, 47, and 345, as said sections have been amended from time to time.

QUESTION TO BE DECIDED.

The question to be decided is whether a common carrier by railroad, subject to the Interstate Commerce Act, which uses as a part of its terminal facilities in Cleveland, Ohio, 1619 feet of track leased by it from the Cleveland Union Stock Yards Company, may violate the duties with respect to the delivery of freight imposed upon the carrier by the Interstate Commerce Act, because the lessor of the track, Cleveland Union Stock Yards Company, demands such violation of law by the lessee railroad common carrier.

STATEMENT OF THE CASE.

At Cleveland the main line of the New York Central Railroad Company (one of the plaintiffs in No. 24435) runs approximately east and west along the northern boundary of the property of the Cleveland Union Stock Yards Company (Ex. 12 and 13). Leading off from this main line is a track known as spur track No. 245, of which the initial 132 feet is owned and operated by the New York Central (Ex. 9; R. 340). This track then continues in a southerly direction through the stock yards property a distance of 1619 feet, this 1619 feet of the track being owned by the Stock Yards Company but maintained by the railroad company without charge against the Stock Yards Company (R. 232; Ex. 9, R. 340). This track is referred to in the lower court's opinion and in the Commission's decision as track 1619 and, for convenience, we will use the same designation. The southerly end of track 1619 again connects with tracks (about 793

feet) which are owned by the New York Central; and these New York Central tracks connect with sidetracks which serve seven industries (Earl C. Gibbs, Inc., Kreinberg & Krasny, Standard Beef Company, Hughes Provision Company, Koblenzer Brothers, Theurer-Norton Provision Company, and Swift) (Ex. 12 and 13; R. 243-4). The tracks owned by the New York Central, as well as that portion of the track leased from the Stock Yards Company, are a part of the Cleveland terminal facilities of the New York Central and afford the only rail connection between the seven industries named and any rail line leading to Cleveland (R. 244).

For many years (1910 to the present time) the New York Central and its predecessor provided by tariff for receipt and delivery of all classes of railroad traffic, including live stock, over these sidetracks connected with the track of the New York Central at the southern end of the stock yards which, in turn, connected with the track leased from the Stock Yards Company and maintained by the railroad company (R. 206-7 and 241). The tariff of the New York Central has continuously provided for such delivery (R. 207-8). Said industries, including that of Swift, are not served directly by the track owned by the Stock Yards Company, but by tracks generally owned by the respective industries and connected directly with the tracks owned by the New York Central, which intervene between said industries and the 1619 feet of track leased by the New York Central from the Stock Yards Company. As stated, these industries have no other rail connections (Ex. 12; R. 243-4).

The history of the construction of track 245 and various industrial sidetracks connecting therewith and the facts which led up to the proceeding before the Commission are stated in detail at pages 56-62 of the Commission's decision (appendix "C") (R. 29-35). Suffice it to say that in

May, 1899, the predecessor railroad company, Cleveland, Cincinnati, Chicago and St. Louis Railway Company, entered into a contract with the Stock Yards Company for the construction of certain tracks upon the property of that company (Ex. 14; R. 347-350). The contract provided that the Stock Yards would bear the cost of constructing said sidetracks and thereafter would bear the maintenance cost of said tracks. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The record does not make clear just what transpired with respect to all of these tracks between May, 1899, and 1924, but a copy of an agreement of June 16, 1924, between the railroad company and the Stock Yards Company (Ex. 9; R. 339-341) indicates that the railroad had taken over the ownership of most of the tracks originally constructed upon the stock yards property, but not including the 1619 feet of track here involved.

Paragraph Fourth of said agreement of June 16, 1924, (Ex. 9; R. 340) provided that thereafter the railroad company would bear the cost of maintenance of all the tracks upon the property of the Stock Yards Company without expense to the Stock Yards Company. This provision covers not only the 1619 feet of track involved but all of the other private tracks of the Stock Yards Company. This contract provided for the free and uninterrupted use by the railroad of any and all tracks or portions thereof belonging to the Stock Yards Company and located upon its land, but it did not provide that railroad use of the track should not interfere with the Stock Yards business.

Effective February 1, 1935, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," which was construed by the Stock Yards and the railroad to mean live stock, "a charge for

which use shall be the subject of a separate agreement" (Ex 31; R. 423-4; 266 I. C. C. 55, 57-58; Ex. 9, R. 338). The parties were unable to agree (Ex. 48; R. 437). The railroad defendants discontinued deliveries of live stock to the Swift sidetrack By letter of August 14, 1941, Swift demanded that the line-haul carriers deliver live stock to its siding, and this demand was refused (Ex. 4 and 5; R. 317, 318, and 212). Thereafter the New York Central cancelled its switching charge which had covered delivery by the New York Central to the Swift plant of live stock reaching Cleveland over railroads other than the New York Central, thus leaving it without any lawful tariff publication to cover such service with respect to shipments originating on the Pennsylvania and other railroads (R. 207; Ex. 2; R. 310 and 312). The New York Central, however, never changed its tariff so as to eliminate deliveries to the Swift plant of shipments reaching Cleveland via the New York Central as the line-haul carrier. As the Commission states (p. 60) (R. 33), "On such traffic the tariffs of that carrier (New York Central) provided, and still provide, for delivery to complainant's (Swift's) siding at the line-haul rates to Cleveland."

From at least 1910 until 1938 the railroad tariffs had provided for and Swift had the right to receive so-called direct shipments of live stock, purchased at other points and billed to its Cleveland plant via lines other than the New York Central, by switch track delivery to its plant (R. 241-2), and the New York Central tariff continues that right to this time upon shipments arriving via that railroad (R. 208-9). After the demand upon the railroads for resumption of such delivery and their refusal, Swift filed its complaint before the Commission alleging violation of various provisions of the Interstate Commerce Act and asking for the entry of an order affording appropriate re-

lief. In this connection it is well to note the care and attention which was given by the Commission to this proceeding.

The Swift complaint was filed with the Commission in September, 1941 (R. 28). It came on for hearing at Cleveland, Ohio, on April 22, 1942, before an examiner of the Commission, Mr. Paul O. Carter (R. 203). A proposed report was issued by Examiner Carter and served upon the parties in April, 1943. Oral argument was had before the entire Commission on June 4, 1943 (R. 465). By order of the Commission (on its own motion) of June 14, 1943, the case was reopened for further hearing and consideration. It was assigned for further hearing at Cleveland, Ohio, on June 22, 1944, before an examiner of the Commission, Mr. T. Leo Haden. At that hearing further evidence was taken (R. 235), and briefs were filed in October, 1944. In May, 1945, a proposed report was issued by Examiners T. Leo Haden and A. J. Banks. The case was again argued before the Commission by counsel for all parties on October 3, 1945 (R. 502). It was thereafter decided by the Commission on May 3, 1946 (R. 28), and the Commission at that time entered its order to be effective August 30, 1946 (R. 157). In the latter part of June, 1946, the Cleveland Union Stock Yards Company filed with the Commission its petition for reconsideration. Swift filed a reply to said petition, dated July 23, 1946. Thereafter the railroad defendants before the Commission filed with the Commission a petition for reconsideration, etc., dated August 4, 1946 (R. 571). Swift filed a reply to said petition, dated August 31, 1946 (R. 600). These petitions and replies were considered by the Commission and said petitions were denied by an order of the Commission of October 7, 1946. Thereafter the two separate complaints in No. 24435 (R. 4 *et seq.*) and No. 24479 (R. 88 *et seq.*) were filed in the United States District Court for the Northern District of Ohio for the purpose of enjoining the Commission's order.

Swift & Company intervened in the District Court cases. Answers were filed. Briefs were filed. A special three-judge court was convened to hear and decide the cases. Oral argument was had, and the cases were submitted. The court filed its opinion (R. 148). After receiving suggestions from the parties, the court entered its findings of fact and conclusions of law (R. 178). On May 14, 1947, the court entered its final order and judgment enjoining the Commission's decision (R. 190). Thereafter this appeal was taken to this court by appellants herein.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

This appellant intends to urge each of the assigned errors.

ARGUMENT.

I.

The District Court Erred in Finding That Track 1619 Is Not Part of the New York Central Railroad Within the Meaning of Section 1 (3) (a) of the Act and Is Not as Much Subject to the Act and Its Provisions as Any Other Part of the Railroad or Facilities of the New York Central.

The first glaring error of the lower court was in its failure to give proper weight and consideration to and to apply properly section 1 (3) (a) of the Interstate Commerce Act. In its consideration of that section, the District Court erred unmistakably in substituting its judgment for that of the Interstate Commerce Commission with respect to matters which Congress has entrusted to the Commission alone.

It will be noted that the Commission, at pages 56 to 62 of its report, reviewed in detail the undisputed facts in connection with the construction of, agreements concerning, and use over the years of track 1619 and found as follows at pages 63-64:

> "Under agreements with the Stock Yards, the New York Central has for years used, and still is using, track 1619 as part of its railroad and terminal facilities at Cleveland. And the agreed use has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New York Central's spur No. 245, by which the latter makes delivery and takes receipt of freight in performing its common-carrier switching

service to and from the plant of complainant and the several other plants and industries served by the spur. Obviously the fact that the New York Central, acting in compliance with its private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over its spur does not alter the fact that the use it is making of the spur, including track 1619, is generally for all traffic offered and all industries reached and is not one confined to the serving of the Stock Yards or other particular plant."

At page 70 the Commission found:

"The switch connection is actually built and in operation for all traffic other than livestock, and clearly is a part of the railroads' common-carrier facilities as defined in section 1 (3) (a)."

The lower court, on the other hand, undertook to reverse the finding of the Commission and, substituting its own judgment for that of the Commission, stated in its finding VII (R. 184):

"In view of the foregoing facts, we think the findings of the Commission with respect to Stock Yards' 1,619 feet of track for a number of years having been devoted to a public use is without legal support in the record."

In its conclusion of law IX (R. 187) the lower court said:

"There has not been any such devotion of Stock Yards' 1,619 feet of track to public use as to amount to a dedication of the Stock Yards' property or track as a public highway or as a part of the Railroad Company's system under the provisions of Section 1 (3) (a) of the Act, over which track the railroad lawfully may move shipments of freight or livestock to the Swift & Company plant."

It will also be noted that the lower court, in its opinion (R. 149) and its finding III (R. 180), referred to the 1924 contract between the Stock Yards and the New York Central as a "private sidetrack agreement", although that contract gave the railroad free and uninterrupted use of track 1619 and provided for operation and maintenance by the railroad. Finding II (R. 180) refers to track 1619 as "one of these private switch tracks."

Scope and nature of Interstate Commerce Act.

It is elementary that the Act is remedial and imposes a comprehensive and integrated scheme of regulation.

In *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 618, 89 L. ed. 499, 507, this court said:

> "The 1940 Act was intended, together with the old law, to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers."

In *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 361, 88 L. ed. 96, 101, this court said:

> "Section 16 is an integral part of the Interstate Commerce Act and of the comprehensive scheme of regulation it imposes. The Act is affected throughout its provisions, with the object, not merely of regulating the relations of carrier and shipper inter se, but of securing the general public interest in adequate, nondiscriminatory transportation at reasonable rates."

From the time of its first enactment, a principal aim of the Act has been to "cut up by the roots every form of discrimination, favoritism, and inequality." *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478, 55 L. ed. 294, 297, 302; *O'Keefe* v. *United States*, 240 U. S. 294, 297, 60 L. ed. 651, 655. See also *New York* v. *United States*, ____ U. S. ____, 91 L. ed. 1083, 1090.

Extent of property, equipment, and facilities which Congress subjected to regulation under Act.

One of the first problems with which Congress must have been confronted in writing the Interstate Commerce Act is the extent to which the Act should be applicable to various kinds of property and facilities used by the railroads. It is fairly obvious that the effectiveness of the Act must depend upon broad application to all tracks and facilities used by the carriers in performing their common carrier function. Congress settled this problem by defining such terms as "railroad" and "transportation" in very broad terms in section 1 (3) (a) of the Act. For example, that section reads in part:

> "*The term 'railroad'* as used in this part *shall include* all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also *all the road in use* by any common carrier operating a railroad, *whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks,* terminals, *and terminal facilities of every kind used or necessary in the transportation of* the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *" (Emphasis supplied.)

Section 1 (1) of the Act, it will be noted, declares that the provisions of the Act shall apply to common carriers

engaged in the transportation of property by railroad. It cannot be denied that the railroad appellees are common carriers engaged in the transportation of property wholly by railroad.

At this point it is logical to consider briefly whether it was the function of the Commission or the lower court to find whether track 1619 comes within the definition of "railroad" in section 1 (3) (a).

Commission's finding binding on lower court.

It is obvious that in a situation of this kind it is proper for the Commission to find whether any particular track or facility under consideration comes within the statutory definition of "railroad". Also it is apparent that the combination of possible facts in connection with such tracks or facilities are kaleidoscopic and such as might tax the wisdom of a Solomon. It seems reasonable that members of an administrative agency who devote all of their working time to transportation problems would be in a better position to make findings in such cases than even the most astute judges who consider such matters only occasionally.

Certainly we should expect great weight to be given such findings by an agency charged with administering a comprehensive plan of regulation under an integrated act such as the Interstate Commerce Act where uniformity of application is desirable. A review of the authorities reveals that such questions are to be determined by the Commission rather than by the courts and that the Commission's findings will not be disturbed if supported by evidence.

United States v. *American S. & T. Plate Co.*, 301 U. S. 402, 81 L. ed. 1186, involved a finding by the Commission as to what, in that case, was embraced within the term

"transportation" within the meaning of section 1 (3) (a). (It will be noted that exactly the same section of the Act was involved there as in the instant case and that the definition of "transportation" is in the same paragraph as the definition of "railroad.") This court there said (pp. 407, 408):

> "The statute contains this definition: 'The term "transportation" shall include * * * all services in connection with the receipt, delivery, elevation, and transfer in transit * * * of property transported.' The Interstate Commerce Commission is authorized and required to enforce the provisions of the Act and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, 'or otherwise in violation of the provisions of this act,' to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist.
>
> * * * * *
>
> The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service. Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it."

In *Interstate Com. Com.* v. *Hoboken Mfrs.*, 320 U. S. 368, 88 L. ed. 107, this court said (p. 378):

> "We are of opinion that these findings are decisive of this appeal. The Commission's determination of the point in time and space at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts."

In *United States* v. *Wabash R. Co.*, 321 U. S. 403, 88 L. ed. 827, this court said (p. 408):

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

Since the definitions of "railroad" and "transportation" appear in the same paragraph of the Act and evidence a similarity of purpose in spelling out the extent of the facilities and services subject to the Act, and since the function of the Commission in making findings with respect to both definitions is practically identical in nature and for the same purpose, it is clear that the above authorities apply with equal force to the finding of the Commission here that track 1619 is within the definition of railroad.

It was not the function of the lower court to determine where the weight of the evidence lay or that the Commission's finding was supported by or was against the weight of the evidence. The function of the court was only to determine whether the Commission's finding was supported by the evidence.

"The courts will not review determinations of the Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions" for "these matters are left by Congress to the administrative tribunal appointed by law and informed by experience."

United States v. *New River Co.*, 265 U. S. 533, 542, 68 L. ed. 1165, 1172.

Chicago, I. & L. R. Co. v. *United States*, 270 U. S. 287, 294, 70 L. ed. 590, 594.

Assigned Car Cases (United States v. *Berwind White Coal Min. Co.)*, 274 U. S. 564, 581, 71 L. ed. 1204, 1216.

Virginian R. Co. v. *United States*, 272 U. S. 658, 665, 666, 71 L. ed. 463, 468.

In determining mixed questions of law and fact the court confines itself to the ultimate question as to whether the Commission acted within its power and, in determining that question, the courts will not examine the facts further than to determine whether there was substantial evidence to sustain its order and whether the Commission made the basic or essential findings necessary to support its order.

Interstate Com. Com. v. *Union P. R. Co.*, 222 U. S. 541, 546-548, 56 L. ed. 308, 310-312.

Florida v. *United States*, 282 U. S. 194, 215, 75 L. ed. 291, 304.

Commission's finding supported by evidence.

Appellant submits that the Commission's finding that track 1619 was and is devoted to a public use, and is within the section 1 (3) (a) definition of "railroad", is amply supported by evidence. The use of the track over the years as a connection between railroad-owned segments of spur track No. 245, the transportation of all commodities over the track thus served and, more recently, the transportation of all commodities except live stock, the recognition in their tariffs for years by the railroads of their obligation to deliver freight to said seven industries and receive freight from them, maintenance and operation of the track by the railroad, all agreed to by the Stock Yards, and the other facts detailed by the Commission, at pages 56 to 62 of its report, lead unmistakably to the finding made by the Commission.

Other decisions by courts and the Commission demonstrate correctness of Commission's findings.

A review of the authorities leaves no doubt that the Commission was correct in its finding that track 1619 is and was devoted to a public use and is within the statutory definition of a "railroad".

In the case of *Union Lime Co.* v. *Chicago & N. W. R. Co.*, 233 U. S. 211. 58 L. ed. 924, a controversy arose because a proceeding was instituted by the Chicago & North Western Railway Company to take by eminent domain land for a spur track. The land was owned by the Union Lime Company, and the application of the railway company was resisted upon the ground that the land was sought to be taken for a private and not a public use, and therefore that its taking would operate as a deprivation of the property of the Union Lime Company without due process of law. The right of the railroad to take the land was sustained by the United States Supreme Court. That court quoted with approval (pp. 220, 221) a determination by the Supreme Court of Wisconsin in a similar case as follows:

> " 'Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent, and not the nature, of its use,—the track is none the less a part of the avenue through which the commodities reach the public. * * * Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to

it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with anyone else who may desire to use it.' "

In the same decision (pp. 221, 222) the court also stated:

"It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track, and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service, and are subject to the regulation of public authority. As was said by this court in *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, 608, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008: 'The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.' There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings."

To the same effect is the recent decision of the United States Supreme Court in *Alton R. Co.* v. *Illinois Commerce Commission*, 305 U. S. 548, 83 L. ed. 344. The relevant facts were stated as follows by the court (p. 550):

"The switch track in question extends from the

carrier's main line about 150 feet on the right-of-way, thence 2,681 feet, crossing public streets and alleys, to the boundary of the plant of the Peoples Gas Light & Coke Company upon land largely, if not wholly, owned by that company and the other industries served by the track. The industries, commencing with the one nearest the main line, are Commonwealth Edison Company, E. Heldmaier, Inc., Moulding-Brownell Corp., and the gas company. All but the first depend upon the track for rail transportation. It has been extended for some distance into the plant of the gas company."

The conclusion of the court is stated as follows (pp. 554-555):

"Assuming that the questions whether the switch track is open to public use and has become a part of the main line are so related to the constitutional issue here presented that the state court's determination of them is not binding upon this Court, we are of opinion that, upon the facts alleged in appellant's petition to the commission, the latter's unchallenged findings, and our decisions in similar cases, it is clear that in point of fact and law the switch track and any extensions of it that may be made are open to use to serve the public and constitute a part of the carrier's system.

Asserting that the duty to maintain a track such as that in question normally results from ownership, appellant earnestly insists that the order is shown to be unreasonable by the fact that rails and other materials purchased and owned by it when put into the track immediately cease to belong to it and become the property of the gas company which, appellant says, retains right of ownership in the track. But, in making that and similar arguments, appellant ignores the decisions in this case of the commission, the state supreme court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and

across public thoroughfares; a track that has become a part of the main line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used, with extensions if any shall be made, to serve the public at large."

Of great interest in this connection is the decision of the Supreme Court of Ohio (the state in which these tracks are located) in *Morgan Run Ry. Co.* v. *Public Utilities Commission*, 98 O. S. 218, 120 N. E. 295. In that proceeding the owners of a certain coal mine reached by a common-carrier railroad serving them over a short intermediate track owned by a competing coal company, but operated by the railroad under an agreement with the owner, were being denied service because of objections from the owner of the intermediate section of track. The Public Utilities Commission of Ohio, which operates under a statute giving it powers similar to the provisions of section 1 of the Interstate Commerce Act, entered an order requiring the railroad to discontinue its unlawful practice and to resume service over the disputed track to the complaining mine. Upon appeal this order was sustained by the Supreme Court of Ohio in the above cited case. In its opinion the court said (p. 298):

"It is contended that the order of the commission requires the railway company to furnish facilities and operate a line on property not owned by it, that the commission has no jurisdiction to require one who is not a common carrier to act as such, and that the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction. Section 523, General Code, provides that the commission shall have the same control over private tracks, so far as such tracks are used by common carriers in

connection with a railroad for the transportation of freight, as it has over tracks of such railroad. Section 8990, General Code, requires all railroad companies to extend to all persons receiving and shipping freight the same and equal opportunities. This statute is declaratory of the common law on the subject.

As we have shown, the railway company is, as to so much of the line of railroad as is owned or operated by it, a common carrier; and any arrangement made by it for the transportation of freight over its road in connection with private tracks is subject to the supervision of the commission."

In its conclusion the court held (p. 299):

"We therefore hold that, as long as the railway company operates any portion of the railroad in question, it must do so without discrimination in favor of any shipper. This is a small and unimportant railroad, whose operations are very limited; but the questions that are brought to the court for consideration are not limited. They affect every common carrier. If this company may arbitrarily select those whom it will serve, any company may do so."

A persuasive decision which supports the Commission's conclusion is that of the Circuit Court of Appeals for the Eighth Circuit in *F. C. Ayres Mercantile Co.* v. *Union Pac. R. Co.*, 16 F. (2d) 395. In that case the Ayres Mercantile Company attempted to restrain the Union Pacific Railroad from using certain tracks which the mercantile company owned, for delivery to various industries served over those tracks. The court said (p. 398):

"That these tracks were devoted to a public use, at least after 1890, is fully established by the evidence."

In the present case it cannot be doubted that track 1619 has been devoted to a public use since 1910 or for at least thirty-six years.

Continuing in the *Ayres Mercantile Company* case, the court said (pp. 398, 400):

"'This railroad company had an established line of railroad through the city of Denver, and the tracks upon Blake street authorized by the ordinance were spur tracks from its main track for the benefit of parties who expected to build warehouses on vacant property abutting upon that street. * * * The suggestion that the license was unauthorized because the permitted tracks were not for public, but for private use, cannot prevail. In a sense every spur track to a private warehouse, manufacturing or trading establishment, is for the private use of those who own and conduct the business therein. But in a larger sense, and in the true sense, every such railroad track is for the public use and for the public benefit, because it enables the public to exchange its commodities for those of the parties who conduct their business upon the track in a more facile and economical way. It reduces the prices of the articles carried to the consumers, and it increases commerce.'

* * * * *

Certainly the service of a large number of industries by these tracks where shipments were made in interstate commerce, and the use of the same for general switching purposes to the various industries besides the Armour and Arbuckle ones, establish under the authorities a use for public purposes.

* * * * *

Even granting the contention that the original occupation was permissive, the character of occupation might change, as apparently it did here. The gates ceased to exist after 3 years. The railroad company added additional burdens to the trackage in the way of switchback movements, which were a part of its general switching system, and, according to the evidence, these switchback movements to the other industries occurred every day."

Since 1910 track 1619 has been devoted to a public use and so used. The Stock Yards Company voluntarily devoted the track to this use knowing the provisions of the Interstate Commerce Act and the definition of a railroad therein contained.

The decisions just cited are in conformity with and give effect to many rulings of the Commission in earlier cases. Thus, in *St. Louis, Springfield & Peoria R. R.* v. *P. & P. U. Ry. Co.*, 26 I. C. C. 226 (decided in 1913), the Commission said (p. 237):

> "The terminal properties of carriers, like all other parts of their property, are devoted to the public use and must be treated exactly as all other parts of the property of common carriers are treated in carrying out the spirit and letter of regulatory statutes."

In *Huerfano Coal Co.* v. *C. & S. E. R. R. Co.*, 28 I. C. C. 502, the Commission said (p. 505):

> "That portion of section 1 which makes it the duty of every carrier subject to the provisions of this act to provide transportation, including cars, upon reasonable request therefor must be read into and made a part of that portion of section 1 which deals with the matter of switch connections between common carriers and lateral branch lines of railroad."

In *I. & S. W. Ry. Co.* v. *C., B. & Q. R. R. Co.*, 42 I. C. C. 389, the Commission stated (p. 393):

> "Terminal tracks are a part of the railroad which is subject to the provisions of the act to regulate commerce and to the jurisdiction of the Commission, and in exercising the powers vested in the Commission to establish through routes and joint rates the terminals stand, to all practical intents and purposes, in the same light as any other part of the railroad."

The Stock Yards itself has not in any manner treated track 1619 as a "private sidetrack." It will be recalled

that the New York Central not only operates the track but maintains it. The Commission has frequently held that a railroad common carrier may not bear the expense of maintenance of private industry sidetracks.

One case bearing upon this point is *Sioux City Term. Ry. Switching*, 241 I.C.C. 53. In that decision, after citing prior decisions, the Commission held that it was unlawful for the railroad company to maintain private sidings within the plant boundaries of two packing companies at Sioux City as well as certain private tracks leading to hay barns, etc., which belonged to the Sioux City Stock Yards Company.

The Commission's views upon this question were tersely stated in the recent decision in *John Morrell & Co. Terminal Allowance*, 263 I.C.C. 69, at pages 73 and 74, as follows:

> "In addition to building and furnishing the Morrell Company with the plant tracks described without compensation, respondents have continuously since that time and now maintain them at their own cost and expense. We consider that a violation of section 6 (7) of the Interstate Commerce Act and of the Elkins Act. *Sioux City Term. Switching*, 241 I.C.C. 53. It is a matter justiciable in another forum, but in order to avoid any misconception that by silence with respect thereto we inferentially or otherwise sanction or condone the unlawful rebate, concession, or discrimination, attention is called to it here."

Provision in the leases for maintenance by the New York Central therefore constitutes a strong and convincing admission by the Stock Yards and the railroad of the public nature of the track.

Fact that track 1619 is operated under lease is not controlling.

The District Court found that track 1619 was not within the statutory definition of "railroad" solely or principally because the New York Central operated the track under a lease instead of under a formal dedication or fee ownership. This is apparent from the following statement in the court's opinion (R. 150):

> "The only reason for thus subjecting the private property of the Stock Yards Company to the use of Swift & Company appears to be a finding that track 1619 for a number of years has been devoted to public use.
>
> We think the finding does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively."

The reasoning of the lower court completely ignores the fact that under section 1 (3) (a) it is not important who owns the track. Not only does that section not make ownership an important element, but it distinctly negatives any inference that ownership is material. It states:

> "The term 'railroad' * * * shall include * * * all the road in use * * * whether owned or operated under a contract, agreement, or lease, and also * * * all terminal facilities of every kind used or necessary * * *."

Bearing in mind that the definitions in this section evidence an intention to extend the provisions of the Act as broadly as possible over the property, facilities, and services used by the railroads, and that otherwise the effective-

ness of the Act would be lessened, probably to the point of serious impairment, it is clear that ownership of the track is not important; and that the District Court erred in finding that the fact that the track was operated under a lease, rather than under ownership by the railroad, precluded a finding by the Commission that track 1619 was devoted to a public use and is within the statutory definition of a "railroad."

Consequences of theory relied on by District Court.

As above stated, the decision of the District Court is grounded on the theory that track 1619 could not be devoted to a public use or be part of a railroad within the statutory definition because of "the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively" (R. 150). If this is the law, then it necessarily follows that the Interstate Commerce Act applies only to property and facilities owned in fee simple by or dedicated to the railroad, or that in any event a railroad and its lessor could withdraw from the operation of the Act any leased track or facility merely by placing in the agreement a clause subjecting a certain commodity to discriminatory penalty payments. Obviously, if such were the law, the Act would be ineffective indeed, and a broad avenue of evasion would be opened to railroads and their lessors whereby accomplishment of the purposes of the Act could be frustrated.

From all of the foregoing it is clearly evident that the District Court erred in its finding and in reversing the finding of the Commission that track 1619 is and was devoted

to a public use and is within the statutory definition of a "railroad."

II.

The District Court Erred in Finding and Concluding That No Discrimination Against Swift & Company or Preference of Its Competitors Exists in Violation of Section 3(1) of the Act; and in Finding and Concluding That the Commission's Order Would, Itself, Prefer Swift & Company.

Section 3 (1) is quoted in appendix "A" and in substance provides that it shall be unlawful for a railroad common carrier to make or give any undue or unreasonable preference or advantage to any particular person, firm, etc., or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, or firm, or any particular description of traffic, to any undue or unreasonable disadvantage in any respect whatsoever. This is what is commonly known as the anti-discrimination section of the Interstate Commerce Act.

The Commission found that failure to deliver live stock to Swift & Company results in prejudice against Swift & Company and preference of certain competitors under section 3 (1) of the Act. The findings and conclusion of the Commission are as follows (pp. 67-68 of Commission's decision):

> "Having in mind that, from the time of its first enactment, a principal aim of the act has been to 'cut up by the roots every form of discrimination, favoritism and inequality' (*Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *O'Keefe* v. *United States*, 240 U. S. 294, 297), consideration should perhaps be first given to the situation under section 3 which has resulted from the New York Central's refusal to handle live stock

over its spur No. 245. While it results from such refusal that the complainant is denied any deliveries at its plant of carload shipments of live stock consigned to it but must, instead, in all cases accept delivery thereof on the premises of the Stock Yards subject to the payments of yardage charges, as above pointed out, the New York Central and other defendant carriers are at the same time continuing to transport like shipments of live stock directly to the plants of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, whose private sidetracks are adjacent to the stock yards but are served without using tracks of the Stock Yards. This service is performed by the defendant carriers at the line-haul rates to Cleveland, and the three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting live stock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their live stock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of live stock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects complainant to undue prejudice and unduly prefers the competing plants above named."

The evidence which supports these findings is stated at R. 212-213. This evidence was undisputed.

Nevertheless, in finding VIII (R. 184-185) the District Court found: "The physical conditions existing with respect to reaching these three plants are therefore definitely different from the conditions attendant upon reaching Swift & Company's plant."

It stated in conclusion XI (R. 187): "To require the service sought by Swift & Company * * * would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks."

In conclusion XII the lower court stated (R. 188):

> "Notwithstanding the similarity of active competition and other phases of the same general business in which Swift & Company and its three competitors are engaged, the pronounced dissimilarity in track connections mentioned above and the failure of Swift & Company to bring itself within the purview of Section 1 (9), with respect to its own track connections, removes any basis for holding that there is any discrimination whatsoever against Swift & Company, or any undue and unreasonable prejudice and disadvantage to Swift & Company in violation of Section 3 (1) of the Act with respect to delivery of carload shipments of livestock."

In its opinion the lower court said (R. 152):

> "To require the service sought by Swift & Company not only would amount to appropriation of the Stock Yards Company's property for the use of Swift & Company, but would in effect prefer Swift & Company over others who built and own their own connecting switches or sidetracks."

This appellant submits that the Commission's finding of a violation of section 3 (1) of the Act is amply supported by the evidence and necessarily follows from the undisputed facts. At the outset, of course, it is evident that, if the Commission was correct in its conclusion that track 1619 forms a part of the New York Central public termi-

nals and is within the statutory definition of "railroad" and that the New York Central is as much subject to the provisions of law with respect to that portion of track 245 "as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places" (Commission's decision, p. 65), then the Commission's finding of a violation of section 3 (1) follows as a matter of course. Since track 1619 is part of the railroad, the fact that the management of the railroad choses to lease the track rather than purchase it or acquire it by condemnation obviously could not be a consideration controlling on the Commission in determining the existence of prejudice or discrimination under section 3 (1).

By reference to appendix "B" it will be noted that the Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company are in the stock yards terminal area and located only a few city blocks from the Swift plant. The New York Central refuses to switch live stock shipments to the Swift plant but does switch them at the flat Cleveland rates to the three competing plants just named. If in the operation of its spur track 245, including the 1619 feet of stock yards track, the New York Central is subject to the provisions of the Interstate Commerce Act, as the Commission has found, it follows that the refusal of the New York Central to switch live stock shipments to the Swift plant, while switching them to three competing plants in the same terminal area, is necessarily an unwarranted discrimination and constitutes undue prejudice to the Swift plant and undue preference of the three competing plants.

Whether or not a particular preference or discrimination is undue or unreasonable is a question for determination by the Commission which will not be set aside by the courts if supported by substantial evidence.

Decisions of this court so holding are numerous. Some of them are as follows:

In *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314, 59 L. ed. 245, this court stated (pp. 320-321):

> "In view of the doctrine announced in *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed. *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 23-29, 45 L. ed. 719, 727-729, 21 Sup. Ct. Rep. 516. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise, since if the view

of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."

In *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 62 L. ed. 831, this court said (p. 481):

"Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or, for some other reason, amount to an abuse of power. This results from the provisions of §§ 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. at L. 589-591, chap. 3591; 36 Stat. at L. 551-554, chap. 309, Comp. Stat. 1916, §§ 8583, 8584), expounded in familiar decisions."

Nashville, C. & St. L. R. Co. v. *Tennessee*, 262 U. S. 318, 67 L. ed. 999, was another case involving an order of the Commission dealing with discrimination under section 3 of the Act. The court said (p. 322):

"Whether a preference or discrimination is undue, unreasonable, or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case."

In *Virginian R. Co.* v. *United States*, 272 U. S. 658, 71 L. ed. 463, this court said (pp. 663, 665-666):

"Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was

some irregularity in the proceeding or some error in the application of rules of law.

* * * * * *

The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois C. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700. This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.'"

In *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 84 L. ed. 1243, this court said (pp. 352-353):

"'It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed.' And where a court substituted 'its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so, (the court) obviously exerted an authority not conferred upon it by the statute.' So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determina-

tion, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination.'"

In *Board of Trade* v. *United States*, 314 U. S. 534, 86 L. ed. 432, this court said (pp. 546, 548):

"'Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * *, and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.' *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 481, 62 L. ed. 831, 844, 38 S. Ct. 383; see *Nashville, C. & St. L. R. Co.* v. *Tennessee*, 262 U. S. 318, 322, 67 L. ed. 999, 1002, 43 S. Ct. 583; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352, 353, 84 L. ed. 1243, 1248, 1249, 60 S. Ct. 931.

* * * * *

We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission."

Length of track, distances, and locations furnish no support to District Court's finding.

The fact that, in order to reach the Swift plant the cars must traverse track 1619 and several hundred feet of track beyond, whereas in order to reach the sidings of The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company the cars need not traverse such tracks, furnishes no support for the court's reversal of the Commission's findings with respect to section 3 (1) or for the court's own finding that the Commission's order would, itself, prefer Swift & Company.

In its report at page 70, the Commission states:

> "As already pointed out herein, it is the general practice of defendants to make industrial deliveries at points in the Cleveland switching district at the line-haul rates to Cleveland, and this practice would have been followed by them in respect of complainant's livestock, as it is now followed on all other carload traffic, were it not for the controversy with the stockyards over the use of track 1619. This is substantiated by the following excerpt from the oral argument of counsel for the New York Central on October 3, 1945:
>
> > It does not make any difference to the New York Central whether this stock is placed at the stockyards' unloading pens or whether it is placed over at Swift & Company's plant. We stand ready to deliver it either place. But because of the barrier placed on this by the stockyards, the owner of the track, we are just not able to deliver over there."

As stated by the Commission, the railroads as a general practice make industrial deliveries within the Cleveland switching district at the line-haul rates to Cleveland. It will be noted that this general practice is followed as to all commodities destined for the Swift plant except livestock. If the railroads are willing to transport a carload of freight to any other point in the Cleveland switching district at the line-haul rate, it becomes apparent immediately that singling out livestock to seven industries for penalty payments could not possibly be justified by the few hundred additional feet a car must travel in order to move from the New York Central main line north of the stock yards to Swift & Company and the other six plants. If track 1619 were owned by the New York Central, no one would be likely to contend that higher rates or any discriminatory practices would be justified in connection with transportation of any commodity to the Swift plant.

It is clear that the only distinction upon which the District Court could reasonably have relied in reversing the Commission's findings with respect to section 3 (1) is that track 1619 was leased by the railroad instead of owned by it. As heretofore pointed out, the facts with respect to ownership of the track are unimportant in the application of the Interstate Commerce Act. If such ownership carries any weight whatever, it would be the function of the Commission rather than the court to determine its weight. Such facts, it will be noted from the Commission's report, were all taken into consideration by the Commission.

It is evident that the District Court erred in reversing the findings of the Commission with respect to section 3 (1) of the Act and also in making findings of its own with respect thereto.

III.

The District Court Erred in Concluding That No Legal Basis Exists for a Finding of Any Violation of Section 1 (6) of the Act.

From appendix "A" it will be noted that section 1 (4) of the Act makes it the duty of every common carrier by railroad to provide and furnish transportation upon reasonable request therefor. Section 1 (5) (a) of the Act provides that all charges made for any service rendered in the transportation of property shall be just and reasonable; and unjust and unreasonable charges are prohibited and declared to be unlawful. Section 1 (6) provides that it is the duty of common carriers subject to the Act to establish, observe, and enforce just and reasonable regulations and practices affecting various matters, including facilities for transportation "and all other matters relating to or

connected with the receiving, handling, transporting, storing, and delivery of property", which may be necessary or proper to secure prompt handling, transporting, and delivery of property upon just and reasonable terms; and unjust and unreasonable regulations and practices are prohibited and declared unlawful.

The reading of these sections discloses that they are intended to give broad regulatory powers with respect to rates, regulations, and practices. The use of such terms as "just and reasonable" reveals an intention to empower the Commission with very broad discretion in making findings, conclusions, and orders to accomplish the purposes of these sections.

At pages 68 and 69 of its report, the Commission made findings with respect to section 1 (6) of the Act, reading in part as follows:

> "The railroad assumed the expense of construction and maintenance, but was granted and is now exercising the right to use the track and extensions for business other than that of complainant. The railroad's spur and complainant's sidetrack are available today, just as they have been for years, for the delivery of livestock directly to complainant's plant. For years all the defendant railroads recognized that the performance of such service was included in the line-haul rates to Cleveland and, even today, the New York Central's tariffs provide for the service at such rates. The only reason advanced for the failure to perform such service is the question as to the New York Central's right to use its spur for the delivery of livestock because of its contract with the Stock Yards respecting the use of track 1619. We have found, however, that such contract has not altered the common-carrier status of the spur or the railroad's duties with respect thereto under the provisions of the act. Accordingly, based on the above facts, circumstances, and considerations, we find and conclude that the defendants' failure,

in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1 (6) of the act."

The court, however, stated as follows in conclusion XIII (R. 188):

"In view of the full knowledge by the complaining shipper of limitations placed upon the railroad's use of another private sidetrack, no legal basis exists for a finding of any violation of Section 1 (6) of the Act."

Section 1 (6) imposes the same obligations with respect to practices which are imposed by section 1 (5) (a) in connection with rates. The Commission found that failure to accord delivery directly to Swift's sidetracks was, under the recited facts, an unlawful practice in violation of section 1 (6). That failure to accord such delivery is a practice is manifest. Whether such practice is unjust and unreasonable is one of those questions which the Commission has been empowered by Congress to decide.

Commission's finding binding on lower court.

There is no law defining such terms as "undue," "unjust," or "unreasonable" as used in sections 1 (3) (a), 1 (5) (a), and 1 (6) of the Act. Section 15 (1) provides that, whenever the Commission shall be of the opinion that "any * * * rate" or "any practice whatsoever * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," the Commission "is hereby authorized and empowered * * * to make an order that the carrier or carriers shall cease and desist from such violation * * *."

It is plain that Congress intended the Commission and

not the courts to find whether a given rate or practice is "unjust and unreasonable" or "unduly preferential or prejudicial." There are certain decisions so indicating which dealt directly with section 1 (6). Those cases will be cited by the other appellants. There are also numerous decisions so holding with respect to section 1 (3) (a) and 1 (5) (a) of the Act. Since there is nothing in the Act indicating any intention by Congress that the findings under section 1 (6) are to be considered different in nature or any less subject to the primary jurisdiction of the Commission than findings under the other sections mentioned, this appellant therefore submits that prior decisions, outlining and comparing the powers and functions of the courts and of the Commission with respect to findings under sections 1 (3) (a) and 1 (5) (a), are equally applicable to findings under section 1 (6) and leave no doubt that the District Court erred in substituting its judgment for that of the Commission.

At page 15 *et seq.* of this brief, authorities are cited involving findings under section 1 (3) (a). At page 33 *et seq.* hereof, authorities involving section 3 (1) are cited. Other decisions of similar import, dealing principally with findings under section 1 (5) (a), are as follows:

Akron, C. & Y. R. Co. v. *United States*, 261 U. S. 184, 67 L. ed. 605, was a case involving an order of the Commission which fixed divisions of rates between connecting carriers. This court said (p. 204):

> "To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province."

United States v. *New River Co.*, 265 U. S. 533, 68 L. ed. 1165. This was a case involving an order of the Commission with reference to distribution of cars to coal mines. This court said (p. 542):

> "The courts will not review determinations of the

Commission made within the scope of its powers, or substitute their judgment for its findings and conclusions."

In *Chicago, R. I. & P. R. Co.* v. *United States*, 274 U. S. 29, 71 L. ed. 911, this court said (pp. 33-34):

"Second. If the order of the commission be unsupported by the evidence, it is, of course, void. *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *United States*) 261 U. S. 184, 203, 67 L. ed. 605, 615, 43 Sup. Ct. Rep. 270. But if the determination of the commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom, of the commission's action."

In *United States* v. *Berwind-White Coal Min. Co.*, 274 U. S. 564, 71 L. ed. 1204 (a case involving distribution of cars to coal mines), this court said (pp. 580-581):

"There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission (*Western Paper Makers' Chemical Asso.* v. *United States*, 271 U. S. 268, 271, 70 L. ed. 941, 942, 46 Sup. Ct. Rep. 500), or to enquire into the soundness of the reasoning by which its conclusions are reached (*Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 471, 54 L. ed. 280, 288, 30 Sup. Ct. Rep. 155; *Skinner & E. Corp.* v. *United States*, 249 U. S. 557, 562, 63 L. ed. 772, 776, 39 Sup. Ct. Rep. 375), or to question the wisdom of regulations which it prescribes (*United States* v. *New River Co.*, 265 U. S. 533, 542, 68 L. ed. 1165, 1172, 44 Sup. Ct. Rep. 610). These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.'"

Merchants Warehouse Co. v. *United States*, 283 U. S. 501, 75 L. ed. 1227, was a case involving alleged discrimination by railroad carriers to warehouses. With respect to review of the Commission's decision this court said (p. 508):

"The credibility of witnesses and weight of evidence

are for the Commission and not for the courts, and its findings will not be reviewed here if supported by evidence."

In this decision the court also stated an additional important conclusion as follows (p. 511):

"Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity."

In *Mississippi Valley Barge L. Co.* v. *United States*, 292 U. S. 282, 78 L. ed. 1260, this court said (pp. 286, 287):

"The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form.

. . . . . .

The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of its report."

Rochester Telephone Corp. v. *United States*, 307 U. S. 125, 83 L. ed. 1147, involved review of an order of the Federal Communications Commission. Nevertheless the decision is based largely upon a discussion of prior cases dealing with court review of orders of the Commission under the Interstate Commerce Act. Referring specifically to that act this court said (pp. 139-140, 146):

"Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable.

. . . . . .

> Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287; 78 L. ed. 1260, 1264, 1265, 54 S. Ct. 692; *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 303 *et seq.*, 81 L. ed. 659, 664, 57 S. Ct. 478."

In *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 88 L. ed. 1420, this court quoted the following statement made in a Federal Power Commission case (pp. 512-513):

> "'Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, *ante*, 333, 64 S. Ct. 281."

The decisions above cited leave no doubt that the only proper function of the District Court was to determine whether the Commission's finding under section 1 (6) was supported by substantial evidence.

Finding amply supported by evidence.

It would be difficult to imagine a more apparent example of a practice which could properly be described as unjust or unreasonable than the inexcusable refusal to make delivery of a commodity to the consignee. In the instant case, therefore, it is fair to state that all of the evidence points to unreasonableness of the practice complained of

except ownership of track 1619. But ownership of the track is material only as one circumstance of many to be considered in ascertaining whether track 1619 is a "private sidetrack" or is within the statutory definition of "railroad." As heretofore pointed out, the Commission properly found that track 1619 is not a private sidetrack and is within the statutory definition. It necessarily follows that an unreasonable practice exists within the meaning of section 1 (6). Not only is the Commission's finding supported by evidence, but no facts are discernible which could be said to cast any doubt on the validity of the Commission's finding.

The lower court erred in substituting its judgment for that of the Commission and in concluding that no legal basis exists for a finding of any violation of section 1 (6) of the Act.

IV.

The District Court Erred in Concluding That No Legal Basis Exists for a Finding of a Violation of Section 1 (9) of the Act.

Section 1 (9) of the Act is quoted in full in appendix "A". The leading cases and particularly *Cleveland, C.C. & St. L. R. Co.* v. *United States*, 275 U. S. 404, 72 L. ed. 338, are summarized by the Commission at page 69 of its decision, and what is there said need not be repeated here.

Under section 1 (9) of the Interstate Commerce Act certain primary findings of fact by the Commission are necessary, and these have been made.

The first essential finding is stated by the Commission as follows (decision, p. 71):

> "We find that the complainant has made application in writing to the carrier for the operation of the switch connection discussed and has tendered interstate traffic to such carrier;"

The demand of Swift upon the several railroad companies, including the New York Central, for operation of the switch connection for the transportation of live stock is contained in a letter of August 14, 1941, which is exhibit 4 in the Commission's record (R. 317). The refusal of this demand by the railroads is exhibit 5 in the Commission's record (R. 318).

The next finding of the Commission is (decision, p. 71):

> "that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant;"

This action by the railroads is shown by exhibit 5 of the Commission's record, above referred to, and is not disputed.

The next finding of the Commission is (decision, pp. 71-72):

> "that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the connection is practicable and may be made with safety and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready and willing to have transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central."

As supporting this finding it is undisputed that the track connection was operated and under the tariffs of the New York Central was available for the delivery of live stock as well as all other traffic since 1910. There is no indication in the record that the track connection is unsafe or impracticable. In fact the statement by counsel for the New York Central at the argument before the Commission on October 3, 1945, quoted in the latter half of page 70 of

the Commission's decision, indicates that the only excuse for not operating the track connection for the delivery of live stock is because of the objection of the Stock Yards Company and not because the track connection is not practicable, may not be operated with safety, or will not furnish a sufficient volume of traffic to justify its operation.

The next finding of the Commission is as follows (decision, p. 72):

> "We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section."

This finding rests upon substantially the same evidentiary facts as does the finding of discrimination under section 3 (1); that is to say, that the railroads do deliver live stock over similar switch connections in the stock yards district to competitors of Swift, namely, Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, while refusing to make similar deliveries to Swift.

It may be noted that the prohibition against discrimination is stated in section 1 (9) in the broadest terms, to wit, that the carrier shall operate the switch connection "without discrimination in favor of or against such shipper." The ultimate finding of the Commission (decision, p. 72) of a violation of section 1 (9) of part I of the Interstate Commerce Act necessarily follows as a matter of course.

Nevertheless the District Court stated in its conclusion XII (R. 187):

> "In view of the undisputed disparity existing between the direct private sidetrack connections of Swift

& Company's three named competitors and Swift & Company's own indirect private sidetrack connection the Commission exceeded its powers and authority in undertaking to invoke in Swift & Company's behalf the powers of the Commission under the provision of Section 1 (9) of the Act."

In its conclusion XV (R. 188) the District Court also stated:

"* * * There is no legal support for the authority or power of the Commission to require railroads to render service in making direct delivery to the private sidetrack of a shipper where there is a legal or physical obstacle preventing such service and where the complaining shipper is, as in this case, well aware of the permissive use only of an intervening private track granted by its owner to the railroads. The fact that the railroads may have gained some benefit for a shipper in obtaining limited use of a privately owned track for a period of time cannot be found to have ripened into a right to require the railroad to provide the use of said intervening privately owned track for the further benefit of the shipper.

Here, as in connection with other sections of the Act previously discussed, the District Court erroneously substituted its judgment for that of the Commission. Where the Commission found similarity of conditions, the District Court found disparity of conditions. Where the Commission found discrimination, the District Court found lack of discrimination.

The argument at page 33 *et seq.* of this brief, pertaining to the validity of the Commission's finding of discrimination under section 3 (1), also supports the Commission's finding under section 1 (9) and will not be repeated here.

The District Court's conclusion XV seems to indicate that the lower court's finding as to section 1 (9) was prob-

ably based upon a misconception of fact. In conclusion XV (R. 188) the court stated:

> "Where, as in this case, the record before the Commission shows that a shipper had the opportunity of constructing its own private sidetrack to connect directly with the main line railroad and the right-of-way of the railroad * * * and the shipper discards that arrangement * * *."

The record indicates that Swift never had any opportunity of constructing its own private sidetrack to connect directly with the main line of the railroad but that the track from the right-of-way southward was to be railroad constructed and owned. This is evident from the following: Swift's predecessor bought four lots at an expense of $5,000 in order to secure land over which it could give the railroad an easement (Ex. 11; R. 347). Easements for the 16-foot right-of-way were given to the railroad in 1908 (Ex. 30; R. 419). From exhibit 13 it will be noted that the railroad does own the track along the right-of-way granted by such easements (R. 270).

A shipper has no power to maintain condemnation actions. Only railroads have that power, and their power, as a rule, is limited to condemning for public rather than private uses.

It is evident that Swift and the other industries attempted to induce the railroad to build a line to be owned and operated by the railroad, to which line the shippers might connect their own private sidings. The shippers furnished the easements but were unwilling to contribute to the railroad an amount of money which the railroad demanded before it would construct and operate such a track. In connection with these facts, see the quotation from *Union Lime Co.* v. *Chicago & N. W. R. Co.*, *supra*, at page 19 herein.

Thus it is evident that the District Court was mistaken

in assuming that Swift ever had an opportunity of reaching the main line of the railroad with a private sidetrack. As is evident from exhibit 12, the private sidings of Swift & Company connect with a track owned and operated by the New York Central at points immediately east of the Swift plant. This is one of the numerous instances where industries not adjacent to a railroad track endeavor to induce the railroad to build a track to the industry properties to which the industries may connect their private sidings.

In this case the public track was built and exists along the south and east sides of the main Swift plant, and the Swift sidings are there connected to the public track. However, since the railroad and the industries were not able to agree on the amount to be contributed to the railroad by the industries, the earlier proposal was not adopted, but the same result was accomplished by the connection across 65th Street, which was actually built. The shipper here desired the railroad to build a track to which the shipper could connect a private siding. The railroad demanded a larger cash contribution from the shipper than the shipper was willing to pay as an inducement to the railroad to build the public track. It would be a novel principle, indeed, if, by refusing to accept any offer made by the railroad, the shipper would thereby deprive himself forever from the protection of the Interstate Commerce Act. It would be even more startling to say that the fact that the shipper and the railroad were unable to agree on some proposal in 1908 thereby deprives the Interstate Commerce Commission of power to perform its duties under the Act or changes or affects in any way the use to which track 1619 has been devoted over the years. Conclusion XV of the District Court is utterly fallacious.

In view of the unassailable finding of the Commission

that track 1619 has been and is devoted to a public use and is within the statutory definition of a "railroad" and since all of the other requisite findings were made to support such a conclusion, this appellant submits that the Commission properly found that section 1 (9) of the Act was violated by the refusal of the defendants to make direct deliveries of live stock to the Swift plant.

V.

The District Court Erred in Finding and Concluding That the Order of the Commission Would Constitute an Appropriation of Property to the Use of Swift & Company.

In its opinion and conclusions the District Court states that the Commission's order would appropriate the Stock Yards' property to the use of Swift & Company without due process of law. That the District Court erred in so holding is demonstrated by the following.

The Stock Yards at all times permitted the use of track 1619 by the New York Central or its predecessor in performing its common carrier services. From time to time the Stock Yards and the New York Central entered into leases providing for use of the track by the railroad and also providing, after 1924, for maintenance as well as operation of the track by the railroad. It is elementary that parties cannot, in a contract, abrogate statutes. On the contrary, the existing laws become a part of the contract.

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 82, 52 L. ed. 681, 695, this Court said in a case involving the Interstate Commerce Act:

> "The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it."

Having voluntarily granted use of the track to the railroad for the purpose of the railroad's public duty under the Interstate Commerce Act, and knowing full well that the railroad was a common carrier subject to the jurisdiction of the Interstate Commerce Commission, the Stock Yards cannot seriously contend that its property is taken without due process merely because the Interstate Commerce Commission orders the track to be operated in a nondiscriminatory and lawful manner as required by the Act. As stated by the Commission at page 67 of its decision, "the Stock Yards, we must assume, knew that it was dealing with a common carrier subject to regulatory laws."

To say that the Commission's order "appropriated" property of the Stock Yards is utterly untrue. Not one word will be found in the Commission's report and order which could be construed as ordering an appropriation. The Commission simply considered the evidence, made findings of fact, as it is obligated by law to do, and ordered the defendants to do what the Act requires them to do. The Stock Yards Company appropriated track 1619 to the use of the New York Central for the purpose of obtaining, at railroad expense, maintenance of all its tracks at the stock yards. Use of the track for live stock was an unavoidable consequence resulting from appellees' own voluntary action, and appellees unjustly accuse the Commission of appropriating the track.

The necessary effect of the lower court's conclusions is that a contract between a lessor and a railroad supersedes the Interstate Commerce Act, ousts the Commission of any jurisdiction over the railroad's operation of the track leased, and leaves the parties free to discriminate and penalize shippers and engage in unjust and unlawful practices in any manner they see fit. The contention is novel that our Constitution protects the right of parties to use their propery in an unlawful manner or that it confers any

right on railroads and their lessors to nullify or repeal the Interstate Commerce Act merely by inserting in a lease a provision which would penalize transportation of a specific commodity over a leased track.

The lower court's belief that the Commission's order would subject track 1619 to "the use of Swift & Company" is untrue on its face. The Swift plant has its private sidetracks which connect with a public track owned by the New York Central on or at the boundaries of the Swift premises. Swift does not use track 1619. The railroad uses it in performing its duties as a common carrier.

It is no concern of Swift whatever who owns the fee title to track 1619 or any other portion of a track anywhere in the United States over which the New York Central or any of its connecting carriers transport commodities in carrying on their occupations as common carriers. Swift & Company merely tenders commodities for transportation by the carriers from one point to another. Swift cannot be said to "use" track 1619 to any greater or different extent than it does any other portion of the national railway system over which a car of its commodities may pass while being transported by a railroad. As previously pointed out, under the Interstate Commerce Act it is entirely immaterial who owns the track if it is being used for a public purpose as is track 1619.

The District Court found that Swift and the other industries being served by track 245 at all times had notice of ownership by the Stock Yards. The District Court did not point out where, in the record, any evidence is found justifying such a finding. At any rate, for the reasons heretofore stated, it would be entirely immaterial whether any of such industries had knowledge of such matters. It is the obligation of the carrier to provide facilities with which to perform its undertaking, and whether it chooses to

purchase, condemn, lease, or acquire those facilities in some other manner is no concern of the shippers.

It also may be observed that, even if track 245 led only to the Swift plant, nevertheless Swift is not the only party who would be entitled to cause products to be transported by a carrier over the track. Any person in the United States caring to ship products to or from the Swift plant would be equally benefited. As stated by the Supreme Court of Wisconsin and quoted in *Union Lime Co.* v. *Chicago & N. W. R. Co.*, 233 U. S. 211, 220, 58 L. ed. 924, 929, "over it (the track) the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof."

It is to be noted that a few days before the railroads and the Stock Yards filed their complaints in the lower court, the Stock Yards sent a letter to the New York Central (R. 54) in which the Stock Yards professed to terminate the lease of track 1619 to the railroad six months later. This appellant is advised that the notice has been withdrawn. Whatever the effect may be of an attempted termination of this kind, this case presents no issues pertaining to such possibility. The order of the Commission necessarily was based upon the facts presented to the Commission, and this appellant submits that the Stock Yards under no imaginable circumstances could, by serving notices of this kind at the time it did, thus retroactively render void or illegal the order of the Commission. At any rate, the District Court refused even to admit such notice as evidence, and obviously its action was correct. Finally, if any doubt remained, the situation now is the same as when the Commission rendered its order inasmuch as the notice has been withdrawn. The question of the effect and legality of any such notice is not a matter to be considered by this court in this proceeding.

VI.

The Cleveland Union Stock Yards Company Was a Proper Defendant in the Proceeding Before the Commission and Is Bound by the Commission's Order in That Case to the Same Extent as the Railroad Defendants Therein.

The plaintiff in No. 24479, Cleveland Union Stock Yards Company, alleged among other things (paragraph IX of the complaint; R. 88 *et seq.*) that the Commission erred as a matter of law in asserting jurisdiction over said plaintiff and over the subject matter of the complaint. This was apparently upon the theory that the Stock Yards Company is not a common carrier by railroad subject to the Interstate Commerce Act. The following argument is included here in anticipation that the Stock Yards Company will make the same contention before this court.

Swift made the Cleveland Union Stock Yards Company a defendant to its complaint before the Commission, and the order entered by the Commission runs against the Cleveland Union Stock Yards Company as well as the railroad defendants. It is the contention of Swift that the Stock Yards Company was a proper party defendant; that it is bound by the order of the Commission to the same extent and subject to the same penalties as are the railroad defendants; and that any action by the Stock Yards Company for the purpose of evading the order of the Commission would violate 18 U. S. C. A. § 550, in that the Stock Yards Company would thereby be aiding, abetting, counseling, commanding, inducing, or procuring the commission of an Act constituting an offense defined in a law of the United States.

Statutory provision under which Stock Yards Company was made a defendant.

Section 2 of the Elkins Act, 49 U. S. C. A. § 42, reads as follows:

> "In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

Since the Stock Yards Company was the owner of track 1619 and since it was by request or compulsion of the Stock Yards Company that the New York Central discontinued delivery of live stock to the Swift plant, it was believed at the time the complaint was filed with the Commission that it was proper under this provision of the Elkins Act to make the Stock Yards Company (in addition to the Cleveland railroads) a party defendant, because the Stock Yards Company was interested in or affected by the regulation or practice under consideration. It will be noted that said section of the Elkins Act provides that orders of the Commission may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are authorized by law with respect to carriers. It is our position that said section of the Elkins Act means literally what it says and that this conclusion is supported by such decisions of the courts as have arisen

under it. We summarize below the principal decisions of that character.

In *United States* v. *Milwaukee Refrigerator T. Co.*, 145 F. 1007, the Circuit Court of Appeals upheld a decree against a refrigerator transit company, which was neither a carrier nor a shipper, as coming within the provisions of this section. The Commission could doubtless have entered an order equivalent to the court decree.

In *United States* v. *Phillips Petroleum Co.*, 36 F. Supp. 480, 484, the District Court said:

> "Section 2 of the Elkins Act deals with the procedure for enforcing the provisions of the statutes relating to interstate commerce and provides for bringing into court additional parties other than carriers, persons interested in or affected by rates or regulations. In this portion of the statute Congress had in mind the enforcement of the Interstate Commerce Act, 49 U. S. C. A. § 1, *et seq.*, as distinguished from punishment for its violation."

Glens Falls Portland C. Co. v. *Delaware & Hudson Co.*, 66 F. (2d) 490, involved a similar question. This was a suit to recover upon a reparation order of the Commission. The Delaware & Hudson Company, a defendant in that proceeding, contended that the order was invalid as to it because it ceased to be a common carrier on April 1, 1930, on which date it conveyed its railroad properties to the Delaware & Hudson Railroad Company. Since it was no longer a carrier, it contended the Commission was without jurisdiction to enter against it the reparation order of August 14, 1930. These contentions were decided adversely to it in the District Court. Upon appeal, the Circuit Court of Appeals said (pp. 491-492):

> "We think they were rightly decided. The findings of fact which established the liability of the Delaware & Hudson Company had been made on June 3, 1929,

before it ceased to be a carrier. The reparation order merely fixed the amount of the damages awarded. Even without specific statutory authority we should agree, for the reasons given below (55 F. (2d) 971, 980-981), that the Commission had jurisdiction to make it; but the matter seems to be put beyond controversy by section 42 of the Act (49 U. S. C. A. § 42), which permits persons in interest other than carriers to be made parties and subjects them to orders of the Commission."

Spencer Kellogg & Sons v. *United States*, 20 F. (2d) 459 (certiorari denied 275 U. S. 566, 72 L. ed. 429), illustrates the same principle. Spencer Kellogg & Sons was neither a common carrier by railroad nor a shipper. It operated certain grain elevators at Buffalo, N. Y., which were used in connection with the transfer of grain between railroads and ships navigating on the Great Lakes. For this service of elevation the railroads, by proper tariff provision, paid the grain elevators 1 cent per bushel. The allegation was that Spencer Kellogg & Sons had violated the law by giving to shippers or consignees of grain moved through its elevators one-half of the 1-cent allowance paid by the railroads—this for the purpose of obtaining more business.

Since the payment by the railroads to Spencer Kellogg & Sons was legal and since Spencer Kellogg & Sons was neither a shipper of the grain nor a common carrier by railroad, practically the sole defense was, as stated by the court (p. 460), "whether a corporation, other than a carrier who acts in performing interstate transportation service, commits a breach of the laws referred to by giving such concessions and rebates." This question was discussed at length by the court and, at page 461, it stated:

"Whether the person committing the act is a shipper or carrier is not determinative."

The court stated in substance that the law was enacted to reach any individual or corporate entity who contributed to a concession or rebate and that the relation which the culprit bore to the carrier is not necessary as a foundation upon which to rest responsibility.

The doctrine of the case, however, is not limited to the payment of a rebate. All of the reasoning would apply equally to any party other than a common carrier by railroad who, by his act, brings about an unjust discrimination, an undue preference, or a denial of transportation service in accordance with the Act.

To the same effect is the litigation commencing (in the United States Supreme Court) in *General Amer. T. Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422, 84 L. ed. 361. The tank car corporation (not a common carrier by railroad) leased tank cars on a rental basis to the terminal company. For reasons stated in the decision, the tank car corporation refused to continue to pay to the terminal company the excess of the mileage earnings over the rentals paid by the terminal company upon the theory that such additional payments would constitute a rebate, discrimination, or concession which had been condemned in certain decisions of the Commission. The Supreme Court held that the litigation involved a question requiring primary administrative action by the Commission. The court said (p. 433) that when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved "the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices." The court further held that the case should not be dismissed below but should be held pending the conclusion of an appropriate administrative proceeding, and remanded the case for action by the District Court in conformity with the opinion.

Following this decision of the Supreme Court, the action taken by the Commission in conformity therewith appears in *Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371. The Commission held in substance that a payment to the oil works by the tank car corporation in excess of the rental paid by the oil works to the tank car corporation would be unlawful. After this administrative decision by the Commission the case came again before the Supreme Court in *El Dorado Oil Works* v. *United States*, 328 U. S. 12, 90 L. ed. 1053. The Supreme Court sustained the Commission's decision on the merits. The tank car corporation was neither a shipper nor a common carrier by railroad. Nevertheless the Commission held that a payment to the oil works by the tank car corporation in excess of the rental paid by the oil works for the tank cars would violate certain specific provisions of the Interstate Commerce Act.

If a person other than a common carrier by railroad may be restrained by a finding or order of the Commission or a decree of a court from acting as a conduit for rebates or bringing about undue preference or prejudice, as in the tank car case, no reason exists why the Stock Yards Company, as well as the railroad, could not be required by the Commission in the present proceeding to cease and desist from acts which result in violations of certain portions of section 1 and other sections of the Interstate Commerce Act.

CONCLUSION.

This court should find that the District Court erred in enjoining the order of the Commission, and should reverse the judgment of the District Court with directions to dismiss the complaints.

Respectfully submitted,

WM. N. STRACK,
JOHN P. STALEY,
Attorneys for Swift & Company.

Chicago, Illinois,

....., 1948.

APPENDIX "A".

Interstate Commerce Act, as Amended, Part I (49 U. S. C. A.).

"SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

* * * * * *

(3) (a) The term 'common carrier' as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this part it shall be held to mean 'common carrier'. The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery,

elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'person' as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

* * * * *

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

* * * * * *

(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to

install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

* * * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by

railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to

the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial,

team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * * *

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to deter-

mine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

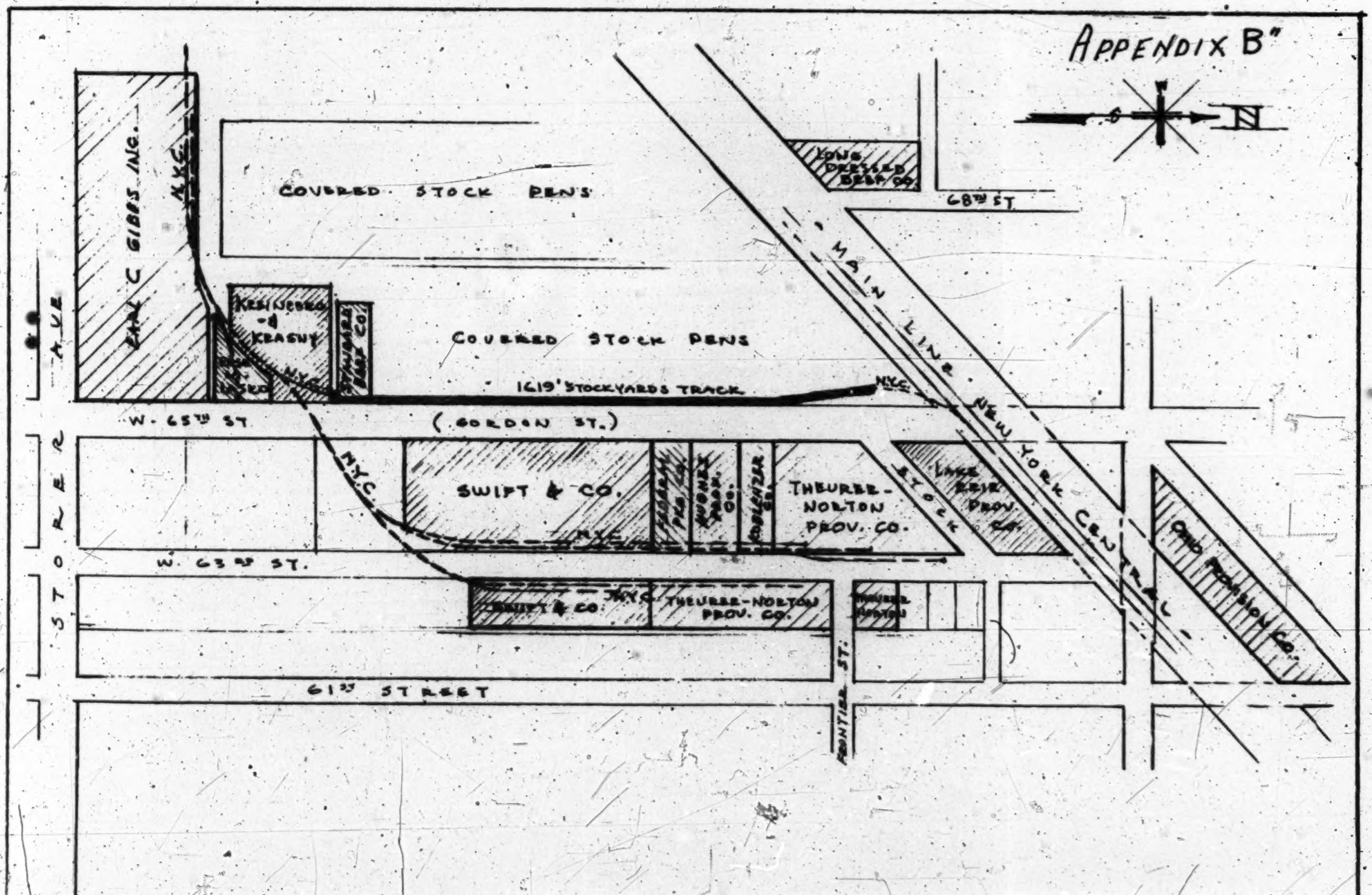
SEC. 16. (7) It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this part shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense."

* * * * *

Elkins Act, Section 2. (49 U. S. C. A. § 42.)

"In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."


APPENDIX B"
N
EARL C GIBBS INC.
N.Y.C.
COVERED STOCK PENS
YOUNG DREISER BEER CO.
68TH ST
MAIN LINE
NEW YORK CENTRAL
KRESINGER & KRASNY
COVERED STOCK PENS
1619' STOCKYARDS TRACK
N.Y.C.
W. 65TH ST
(GORDON ST.)
STORER
SWIFT & CO.
N.Y.C.
FOREMAN PKG. CO.
SWONEK PROV. CO.
FORENZER CO.
THEURER-NORTON PROV. CO.
STOCK YARDS
LAKE ERIE PROV. CO.
GRAD PROVISION CO.
W. 63RD ST.
SWIFT & CO.
N.Y.C.
THEURER-NORTON PROV. CO.
61ST STREET
FRONTIER ST.

APPENDIX "C"

24760

INTERSTATE COMMERCE COMMISSION

No. 28714

SWIFT & COMPANY v. BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Submitted October 8, 1945. Decided May 3, 1946

1. The refusal of defendants to deliver to the sidetrack of complainant, at Cleveland, Ohio, livestock shipments consigned thereto, while contemporaneously providing such service to complainant's competitors, found to be unduly prejudicial and preferential in violation of section 3 (1), an unreasonable and unlawful practice in violation of section 1 (6), and in violation of section 1 (9) of part I of the Interstate Commerce Act. Order issued directing the correction of these violations.
2. Where complainant makes application in writing to a railroad for the operation of a switch connection, has tendered interstate traffic to such carrier and the carrier has refused to maintain or operate such connection for the transportation of livestock to complainant's plant, and the record shows operation over the track for a number of years for the transportation of livestock, and at present for the transportation of commodities other than livestock, and the connection is practicable and may be made with safety, as in this case, and will furnish reasonable compensation to the carrier with whose line the connection is made, and the carrier refuses to maintain and operate such connection, a discrimination against complainant and a violation of section 1 (9) is found to exist.
3. Carriers cannot make contracts which abrogate the provisions of the Interstate Commerce Act.
4. The record does not contain evidence authorizing an award of reparation.

Ross D. Rynder for complainant.

W. N. King, R. R. Pierce, Kemper A. Dobbins, D. P. Connell, John J. Fitzpatrick, Andrew P. Martin, Willis T. Pierson, Dwight B. Buss, G. H. P. Lacey, A. Z. Baker, M. S. Farmer, and *C. R. Heinemann* for defendants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by complainant to the report proposed by the examiners, and the issues were argued orally. Our conclusions differ from those recommended by the examiners.

By complaint filed September 5, 1941, complainant corporation alleges that the refusal and failure of defendants to deliver interstate carload shipments of livestock to complainant's sidetrack facilities at its packing plant in Cleveland, Ohio, have subjected and will subject complainant to charges for the transportation of livestock which were,

the situation under section 3 which has resulted from the New York Central's refusal to handle livestock over its spur No. 245. While it results from such refusal that the complainant is denied any deliveries at its plant of carload shipments of livestock consigned to it but must, instead, in all cases accept delivery thereof on the premises of the Stock Yards subject to the payments of yardage charges, as above pointed out, the New York Central and other defendant carriers are at the same time continuing to transport like shipments of livestock directly to the plants of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company, whose private sidetracks are adjacent to the stockyards but are served without using tracks of the Stock Yards. This service is performed by the defendant carriers at the line-haul rates to Cleveland, and the three plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located. The evidence shows, and we so find, that, with respect to the service, including the effecting of plant delivery, involved in transporting livestock to all of the plants, including that of complainant, the circumstances and conditions of transportation are substantially the same; that all plants are engaged in the same general business, buying their livestock in the same markets and disposing of the same dressed products in the same consuming territory; and that active competition exists between them in purchasing the live animals and in selling the dressed products. Accordingly, we conclude that the defendant carriers' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof on the latter's sidetracks while according such service in connection with like shipments consigned to its competitors subjects complainant to undue prejudice and unduly prefers the competing plants above named.

The history of the New York Central's spur No. 245 has been outlined above. The complainant negotiated for its construction, conveyed to the railroad part of the land necessary for right-of-way, and obtained the necessary city ordinance for crossing Sixty-fifth Street. At about the same time, complainant's own plant track connecting with the spur was constructed under agreement with the railroad, and from time to time thereafter extensions of the track have been constructed under like agreements. The railroad assumed the expense of construction and maintenance, but was granted and is now exercising the right to use the track and extensions for business other than that of complainant. The railroad's spur and complainant's sidetrack are available today, just as they have been for years, for the delivery of livestock directly to complainant's plant. For years all the defendant railroads recognized that the performance of such

service was included in the line-haul rates to Cleveland and, even today, the New York Central's tariffs provide for the service at such rates. The only reason advanced for the failure to perform such service is the question as to the New York Central's right to use its spur for the delivery of livestock because of its contract with the Stock Yards respecting the use of track 1619. We have found, however, that such contract has not altered the common-carrier status of the spur or the railroad's duties with respect thereto under the provisions of the act. Accordingly, based on the above facts, circumstances, and considerations, we find and conclude that the defendants' failure, in connection with the transportation of carload shipments of livestock consigned to complainant's plant, to accord delivery thereof directly to the latter's sidetracks, is an unreasonable and unlawful practice in violation of section 1 (6) of the act.

Furthermore, section 1 (9) of the act, earlier outlined, which empowers us to require the railroads to construct, maintain, and operate switch connections with private sidetracks constructed to connect therewith, shows clearly the intent and purpose of the law to clothe us fully and specifically with authority over the matter of the railroads' service in making delivery and taking receipt of freight directly to and from the sidetracks of shippers.

The language of section 1 (9) has been interpreted by the Supreme Court in *Interstate Commerce Commission* v. *Delaware L. & W. R. Co.*, 216 U. S. 531, 537, as having for its object "primarily, at least, to provide for shippers seeking an outlet either by a private road or a branch. * * *" And in *United States* v. *B. & O. S. R. Co.*, 226 U. S. 14, 19, the Supreme Court stated that "the most obvious examples of such lines [lateral, branch lines] are those that are dependent upon and incident to the main line—feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment."

In the case of *Cleveland C., C. & St. L. Ry. Co.* v. *United States*, 275 U. S. 404, the Supreme Court held (page 408) that the authority conferred upon us by section 1 (9) of the act is not affected by the exemption of industrial, team, et cetera, tracks contained in section 1 (22); that paragraphs (18) to (21), inclusive, of section 1 do not cover sidetracks built by shippers, but section 1 (9) relates "to switch connections with private sidings built by the shipper" (page 408); that the authority to require one carrier to construct and operate a switch connection between its main line and the private sidetrack of an industry, conferred upon this Commission by section 1 (9), is not confined to a case where the industry has no direct connection with the main line of any other carrier (pages 412–418), and that the word "shipper" as used in the paragraph is not confined to one who, at the time he makes application for the switch connection referred to in the

are, and will be unreasonable, unjustly discriminatory, unduly preferential of complainant's competitors at Cleveland, unduly preferential of commodities other than livestock, and unduly prejudicial to complainant. Violations of section 1 (3) (a), (5), (18), (19), (20), and of sections 2 (1), 3 (1), and 6 (7) of the Interstate Commerce Act are alleged. In its briefs complainant urges that the evidence also establishes violations of section 1 (4), (6), and (9) of the act. The complaint is broad enough for us to consider the case under those provisions of the act as well as others. To plead the law relied on is no more necessary in a proceeding before the Commission than it is in a judicial proceeding. *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29.

Complainant seeks the establishment of tariff provisions under which it may have transported to its plant carload shipments of livestock at rates not in excess of the railroad defendants' line-haul rates to Cleveland, thus restoring on shipments over the lines of carriers other than the New York Central the services and deliveries which were authorized by tariffs prior to November 12, 1938, and over the New York Central the services and deliveries authorized by its present tariffs. Complainant also seeks reparation in such sum as it may have been or may be required to pay, in excess of the line-haul rates, in order to obtain delivery of livestock, since August 10, 1941, and *pendente lite*. Reference herein to The New York Central Railroad Company will include its predecessor, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, lessee); and reference to complainant will include its predecessors, Henry C. Thom, People's Packing Company, and People's Packing & Provision Company.

The Cleveland Union Stock Yards Company, hereinafter called the Stock Yards, is made a defendant, and is alleged to be partially responsible for the alleged violations of the act. The Stock Yards is a proper party defendant in this proceeding, as its interests are directly affected by the rates, regulations or practices under consideration within the meaning of section 2 of the Elkins Act, 49 U. S. C. A., sec. 42, shown in the footnote.[1]

Complainant's packing plant at Cleveland extends from West Sixty-third Street on the east to West Sixty-fifty Street on the west and is directly across Sixty-fifth Street from the stockyards. The main

[1] "That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

line of the New York Central runs northeast and southwest some distance north of complainant's plant and along the northern boundary of the stockyards. Leading south from the main line and just west of Sixty-fifth Street is spur track No. 245 of the New York Central. The initial 132 feet of this spur is owned and operated by the railroad. The spur then continues 1,619 feet south over tracks and land owned by the Stockyards but maintained and operated by the railroad, hereinafter called track 1619. Continuing south of track 1619 and connecting with it is another railroad owned section of the spur, about 793 feet along. This section forms a wye, then crosses Sixty-fifth Street and swings northeast to the west side of Sixty-third Street, thence north just west of that street to complainant's siding and the sidetracks of three other industries, including a packing plant operated by Koblenzer Brothers. Track 245 affords the only rail connection between these four industries and three others located west of Sixty-fifth Street, all south of the main line, and the railroads serving Cleveland. Complainant's private sidetrack is operated under an agreement with the New York Central.

The facts with respect to the construction of track 1619 are as follows: On May 10, 1899, the Stock Yards and the New York Central entered into an agreement for its construction. The Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became the owner thereof. The New York Central laid the track and maintained it at the Stock Yards' expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The railroad reserved the right, after 60 days' notice in writing, to discontinue the use of the track and to remove the connections. The agreement of May 10, 1899, was superseded by another of June 16, 1924, confirming the Stock Yards' ownership of track 1619 and providing for the maintenance thereof by, and at the expense of, the railroad. The free use of that track by the railroad was stated to be in consideration of maintenance. That agreement provided for its termination by either party on 30 days' written notice, but did not provide specifically that railroad use of the track should not interfere with the Stock Yards' business. The New York Central keeps track 1619 in repair and controls and operates the locomotives and other rolling stock which pass over it. Portions of the spur from the main line to complainant's siding were dedicated to public use by various easements conveyed to the railroad by the Stock Yards, complainant, and others.

Effective February 1, 1935, after 30 days' notice in writing, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," construed by the parties to mean

livestock, " a charge for which use shall be the subject of a separate agreement." The Stock Yards then demanded on livestock delivered over track 1619 to chutes of complainant and other specified parties the charges named in Stock Yards' tariff No. 5 applicable to livestock consigned through the stockyards direct to packers and not offered for sale, ranging from 5 cents per head on sheep to 20 cents per head on cattle, or from $6 to $9 per carload. On September 7, 1938, the Stock Yards' charge became $5 per deck. No agreement concerning such charges was reached between the railroad and the Stock Yards, and on November 12, 1938, the switching charge of the New York Central was made inapplicable to livestock. In the meantime defendants had discontinued deliveries of livestock to complainant's siding. The carriers considered the charges demanded by the Stock Yards prohibitive as compared with a reciprocal switching charge of $3.47 per car then maintained by the railroads. By letter of August 14, 1941, complainant demanded that the line-haul carriers deliver livestock to its siding, which demand was refused. Complainant has since billed its livestock to its siding, which instructions defendants have ignored. Delivery has been tendered and accepted under protest at the unloading pens in the stockyards.

Events leading to the construction of the tracks to complainants' plant were as follows:

Beginning September 14, 1907, complainant and certain other industries negotiated for a direct spur from the New York Central's main tracks at Sixty-third Street, thence south over Sixty-third Street and across private land of the Lake Erie Provision Company to complainant's plant. A city ordinance to cross Sixty-third Street was obtained on May 25, 1908, and in May 1909, the court condemned the private land, awarding $13,500 damages. This made the total estimated cost of the track about $24,500. The track was not built as the interested parties were unwilling to bear so great an expense. Had this track been built it would not have been necessary to use track 1619 to reach complainant's plant.

In March 1910, complainant negotiated for the construction of the existing connection with its plant, which, as previously shown, crosses Sixty-fifth Street. It obtained the necessary city ordinance on September 6, 1910. The right-of-way east of Sixty-fifth Street, excepting a small parcel obtained from the stockyards, was conveyed to the railroad by complainant. The New York Central thus used (1) its own spur track, (2) stockyards' track 1619, and (3) its own tracks, to reach complainant's siding. Portions of the railroad's own tracks were laid over its own right-of-way across West Sixty-fifth Street, and on land covered by easements from the stockyards, complainant, Theurer-Norton Provision Company, and others.

Under a sidetrack agreement dated October 27, 1910, between complainant and the New York Central, the railroad was to construct and maintain the plant track at its own expense, to own the track, and to use it for business other than that of complainant when such use would not interfere with complainant's business. Both parties retained the right to discontinue use of the track and to require its removal on 60 days' notice. On May 25, 1912, a similar agreement was executed as to an extension of complainant's sidetrack. The agreements of October 27, 1910, and May 25, 1912, were superseded by one dated November 25, 1916, providing for a further extension of complainant's siding at complainant's expense for construction and maintenance, to be owned by complainant. This agreement also contained 60-day termination clauses in favor of both parties. On April 2, 1938, an agreement covering a sidetrack of the Federal Packing Company immediately north of complainant's siding was assigned to complainant. That agreement also contained a 30-day mutual termination clause.

In the western side of its plant complainant has 10 covered holding pens, sufficient to hold from 5 to 8 double-deck carloads of livestock. Two of the pens are for animals suspected of disease or imperfections. The other 8 pens are used for stock intended for slaughter, which is driven directly across the street from the stockyards, and for stock unloaded from trucks just south of the plant or from cars on complainant's siding near the southeast corner of the plant. On this siding only 1 car at a time can be spotted for unloading at the runway leading west through the plant about 150 feet to the 10 storage pens. By constructing movable platforms and placing them alongside the cars, several cars of livestock could be unloaded at one time. Truck shipments are received at a different entrance but reach the same alleys and pens. Complainant has land available south of its plant for enlarging its unloading and storage facilities.

From 1910 to February 1, 1935, defendants transported all classes of freight, including livestock, to and from complainant's siding over track 1619, and since February 1, 1935, they have transported all freight, other than livestock, to and from such siding over said track. Defendants also transport carload shipments of livestock to the private sidetracks of complainant's competitors, The Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company whose tracks are adjacent to the stockyards but are served by defendants without using tracks belonging to the stockyards. This service is performed by the carriers at the line-haul rates to Cleveland, and the three competitive plants are all located in the same general section of the New York Central's Cleveland yard as that in which complainant's plant is located.

Prior to November 12, 1938, the tariffs of the defendant rail car-

riers provided for delivery of carload shipments of livestock to complainant's siding in Cleveland at the line-haul rates to that point regardless of whether the shipments moved in line-haul service over the New York Central direct to Cleveland or over the lines of other carriers to points of interchange there with the New York Central and thence in switching service by the latter carrier to complainant's siding. The interline or interchange movements were made under authority of a reciprocal switching tariff of the New York Central, which provided for a switching charge of $3.15 (later $3.47) per car for switching carload freight generally, including livestock, from points of interchange with other carriers in the Cleveland switching district to the siding of complainant as well as numerous other industrial sidings in Cleveland. The tariffs of the other carriers provided for absorption of the New York Central's switching charge when their revenues exceeded specified amounts. On November 12, 1938, the New York Central canceled its switching charge on livestock but continued it on all other freight. Since then there has been no specific tariff authority for movement of livestock to complainant's siding when shipped to Cleveland over lines other than the New York Central. No similar cancelation was made, however, as to rates on shipments of livestock billed to complainant's siding for movement in line-haul service over the New York Central to Cleveland. On such traffic the tariffs of that carrier provided, and still provide, for delivery to complainant's siding at the line-haul rates to Cleveland. Nevertheless, for some time prior to November 12, 1938, and continuously since then, defendants have refused to deliver any livestock to complainant's siding, whether moved to Cleveland in line-haul service by the New York Central or by other carriers. Instead they have delivered all livestock consigned by complainant to itself at Cleveland into the yards of the Stock Yards Company at that point, and have collected the Cleveland line-haul rates on all such shipments. On livestock so delivered 24 hours' free storage is allowed. The stock is driven from the unloading pens through the stockyards to an exit directly across the street from complainant's plant, thence across track 1619 and Sixty-fifth Street into the portion of complainant's plant where it is to be slaughtered. Movable gates, previously installed, confine the stock while crossing track 1619 and Sixty-fifth Street. Certain yardage charges are assessed against the stock for egress from the stockyards.

Prior to 1930, the Stock Yards made no charge for the use of its facilities on direct shipments,[2] and as delivery at the stockyards was then as satisfactory to complainant as delivery on its own siding it billed little, if any, livestock to that siding, although tariffs in effect

[2] Direct shipments of livestock are defined to mean livestock consigned directly to packers for slaughter, and not offered for sale in the public market.

when the siding was constructed and thereafter had authorized such delivery. About 1930, the Stock Yards attempted to charge packers for delivery on direct shipments through the yards, and between January 1, 1930, and February 1, 1935, complainant had 1,161 carloads delivered at its siding on which it paid the line-haul rates to Cleveland. Apparently such deliveries ceased after the latter date. During the same period, complainant also received 2,260 carloads through the stockyards. During a short period in 1934, the Stock Yards collected from the packers certain yardage charges; but, when the packers objected and threatened to divert shipments from the stockyards, the effort to collect such charges from them was abandoned. A charge of $4 per deck for delivery at the stockyards was paid and borne by the road-haul carriers to and including June 9, 1942. This included delivery to complainant.

Between 1916 and 1936, complainant owned stock in the stockyards. Its plant managers at Cleveland from November 2, 1916, to April 28, 1936, served as directors of the stockyards. From 1920 to 1924 the traffic manager of complainant, the stockyards, and the Cleveland Provision Company formed a traffic and transportation committee for the stockyards district. By order of the Supreme Court of the District of Columbia, dated January 31, 1931, complainant was required to divest itself of ownership in public stockyards which was accomplished at Cleveland February 8, 1936.

The duties of the railroads with respect to in-bound shipments of livestock to consignees at the Cleveland Stock Yards include the furnishing of suitable pens for unloading and the service of unloading from the cars into such pens. When those services are performed the carriers' duties are completed. The Secretary of Agriculture has asserted jurisdiction of charges on direct shipments to packers for services accorded by the Stock Yards beyond the unloading pens. For a complete discussion of this question, see *Baltimore & O. R. Co.* v. *Cleveland Union Stock Yards Co.*, 255 I. C. C. 579, decided May 11, 1943. Since then complainant has been required to pay service charges to the Stock Yards in order to obtain possession of its direct shipments through the yards. As stated, the instant complaint seeking delivery at its siding was filed by complainant on September 5, 1941.

The New York Central excuses its failure to make the delivery to complainant's siding in Cleveland as called for in its lawfully filed and published tariffs, which delivery was requested by complainant from and after August 14, 1941, on the ground that to do so it would have to use track 1619 and pay to the Stock Yards Company charges of from $6 to $9 per car demanded by that concern for the use of that track. The New York Central considers these charges exorbitant. It therefore refuses to pay them or to deliver livestock to com-

plainant at its siding. It is our opinion that a carrier may not evade the provisions of its lawfully filed and published tariffs on such grounds. In our report in *Guyton & Harrington Mule Co. v. Louisville & N. R. Co.*, 50 I. C. C. 546, 550, in respect of a somewhat similar situation at Nashville, Tenn., we found that the delivery of livestock, moving as defined in the Interstate Commerce Act, to complainant's siding in Nashville, at the line-haul rates to Nashville, was a privilege and facility shown in the lawfully filed and published tariffs of the delivering carrier, that the denial of the use of those facilities to complainant there was a rule, regulation, or practice in contravention of the carriers' tariff provisions which changed or affected the value of the service rendered to complainant as shipper and consignee, and that it was and will be unlawful for the delivering line to refuse to make deliveries of livestock to complainant's siding in Nashville.

The carrier's defense presents the question of whether a railroad, by entering into a contract with the Stock Yards Company aimed at compelling shippers making livestock shipments to Swift and the other industries beyond the track of the Stock Yards Company to use the facilities of the Stock Yards Co., can abrogate obligations placed upon it, in the public interest, by the Interstate Commerce Act. It is our opinion that it cannot, and that the relief sought by Swift should be granted.

Section 1 (1) of the Interstate Commerce Act declares: "The provisions of this part shall apply to common carriers engaged in (a) the transportation of passengers or property wholly by railroad * * *." Section 1 (3) (a) provides that the term railroad shall include "* * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation * * * of * * * persons or property * * * including all freight depots, yards or grounds used or necessary in the transportation or delivery of any such property." It defines the term "transportation" as including "locomotives, cars, * * * and all instrumentalities and facilities of shipment or carriage irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, * * * and handling of property transported."

Section 1 (4) provides that—"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor." Section 1 (6) declares:

> It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce * * * just and reasonable

regulations and practices affecting * * * the manner and method of * * * delivering property for transportation, the facilities for transportation, * * * and all other matters relating to or connected with the handling, transporting, storing, and delivery of property * * * which may be necessary or proper to secure the safe and prompt * * * handling, transportation, and delivery of property * * * upon just and reasonable terms, and every unjust and unreasonable * * * regulation and practice is prohibited and declared to be unlawful.

Section 3 (1) provides that—

It shall be unlawful for any common carrier subject to this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

Section 1 (9) provides—

Any common carrier subject to the provisions of this Act, upon application of * * * any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any * * * private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.

And it authorizes us upon complaint and hearing to enforce performance of that duty.

Section 15 (1) provides for the enforcement of these several provisions of the law.

These provisions of the law are complementary and clearly confer upon us the power and duty of regulating and controlling the practices of carriers affecting the transportation and delivery of property, and with respect to all the road, instrumentalities, and facilities used by them in performing such services.

Under agreements with the Stock Yards, the New York Central has for years used, and still is using, track 1619 as part of its railroad and terminal facilities at Cleveland. And the agreed use has been, and still is, not as a mere private track, or plant facility, of the Stock Yards, but as an essential link in, or part of, the New York Central's spur No. 245, by which the latter makes delivery and takes receipt of freight in performing its common-carrier switching service to and from the plant of complainant and the several other plants and industries served by the spur. Obviously the fact that the New York Central, acting in compliance with its private agreement with the Stock Yards, is at the present time refusing to transport particular traffic over its spur does not alter the fact that the use it is making

of the spur, including track 1619, is generally for all traffic offered and all industries reached and is not one confined to the serving of the Stock Yards or other particular plant. As stated by the Supreme Court in *Union Lime Co.* v. *Chicago & N. W. Ry. Co.*, 233 U. S. 211, 221–222:

> A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. * * *

Track 1619 and the said railroad spur No. 245 which includes such track are located in the State of Ohio. In *Morgan Run Ry. Co.* v. *Public Utilities Commission*, 120 N. E. 295, the Supreme Court of Ohio had before it a situation closely analogous to that before us here. In that proceeding the owners of a certain coal mine reached by a common-carrier railroad serving them over a short intermediate track owned by a competing coal company, but operated by the railroad under an agreement with the owner, were being denied service because of objections from the owner of the intermediate section of track. The Public Utilities Commission of Ohio, which operates under a statute somewhat similar to the provisions of sections 1 and 3 of the Interstate Commerce Act, entered an order requiring the railroad to discontinue its unlawful practice and to resume service to the complaining mine. Upon appeal this order was sustained by the Supreme Court of Ohio in the above cited case. In its opinion the court said:

> It is contended that the order of the commission requires the railway company to furnish facilities and operate a line on property not owned by it that the commission has no jurisdiction to require one who is not a common carrier to act as such, and that the tracks which are located on the land of the coal and mining company are the private tracks of that company, over which the commission has no jurisdiction. Section 523, General Code, provides that the commission shall have the same control over private tracks, so far as such tracks are used by common carriers in connection with a railroad for the transportation of freight, as it has over tracks of such railroad. Section 8990, General Code, requires all railroad companies to extend to all persons receiving and shipping freight the same and equal opportunities. This statute is declaratory of the common law on the subject.
>
> As we have shown the railway company is, as to so much of the line of railroad as is owned or operated by it, a common carrier; and any arrangement made by it for the transportation of freight over its road in connection with private tracks is subject to the jurisdiction of the commission.

The court therefore held that:

> As long as the railway company operates any portion of the railway in question, it must do so without discrimination in favor of any shipper. This is a small

and unimportant railroad, whose operations are very limited; but the questions that are brought to the court for consideration are not limited. They affect every common carrier. If this company may arbitrarily select those whom it will serve any company may do so.

Here, as above pointed out, the agreed as well as actual use by the New York Central of the Stock Yards' track 1619 is not as a mere private track but is as an essential part of its spur No. 245. To say that the Stock Yards, while granting the use of its track 1619 generally for common-carrier service, may yet specify exceptions as to particular traffic which must be observed by the carrier, would be to assume that the Stock Yards and the New York Central could, by special provisions in their contract, change and nullify the laws under which the latter operates. By the contract, the Stock Yards is not withdrawing its track from public use but, on the contrary is contracting for its continued use as part of the railroad's common-carrier spur No. 245. Whatever may be the right of the Stock Yards to altogether withdraw its track from public use, it seems evident and we so conclude, that the attempted special exception as to livestock could not, and has not, changed the common-carrier status of the New York Central's spur No. 245 but that the latter remains, with respect to its said spur, as much subject to the act and its provisions as it is with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places.

Before considering the provisions of the act involved in their application to the facts of record, it will be helpful to give further and more particular consideration to the terms of the Stock Yard's contract with the New York Central and their operation in effecting the exclusion of livestock from the traffic switched by the latter over its spur. Such contract does not expressly forbid the use of track 1619 for the carriage of livestock but rather singles it out as a special class of traffic for burdensome treatment. In terms, the contract simply prohibits the "free use" of the track for livestock and provides that a charge for the use thereof for livestock "shall be the subject of a separate agreement." But, after the making of the contract, the Stock Yards, in specifying the terms upon which it would agree to the use of the track for livestock, insisted that the railroad must pay, or assume, the yardage charges on livestock named in Stock Yards' tariff No. 5. The railroad refused to undertake such payments and, in lieu thereof, discontinued the switching of livestock over its spur to the siding of complainant, from which it resulted as stated above, that the latter had to accept delivery of the livestock on the premises of the Stock Yards subject to the payment of the yardage charges.

From the above, it is apparent that, while under the contract and terms of compensation subsequently demanded by the Stock Yards,

it was still open to the railroad to switch livestock over the spur embodying track 1619, the effect of the contract and such terms of compensation was to impose a penalty if it continued to do so. In fact, regardless of the amount of compensation specified by the Stock Yards for the use of its track for the carriage of livestock, the very singling out of livestock for the requirement of special compensation from the railroad shows that the provision is properly classed as a penalty provision, that is, one designed to secure yardage charges on livestock billed and moving to complainant's siding, either from complainant, or from the railroad engaged in hauling the traffic. The ground upon which the railroad discontinued the switching of livestock over the spur was that the compensation (consisting of the yardage charges) demanded by the Stock Yards for the incidental use of its track was exorbitant, but even if the compensation demanded had been but a fraction of that named, the railroad could, so far as the contract was concerned, have followed the same course and thus have avoided the payment of any compensation, or charge, specially set up against the use of the track for the carriage of livestock.

There has been some suggestion that, if we were to order the New York Central to resume the switching of livestock over its spur No. 245, the result of such action would be to compel it to assume payment of the yardage charges named in Stock Yards Tariff No. 5, but we do not think that that is the case. In the first place, there is nothing in the present or previous contracts granting the use of track 1619 to the railroad which even suggests that the parties considered that, in addition to the railroad's assumption of the expense of track maintenance and other consideration for years regarded as entirely adequate, further compensation simply for such use was warranted. Apparently, it was the view of the railroad as well as the Stock Yards that the latter was within its rights as owner of the track to condition its contract for the use thereof in such way as to secure yardage charges on livestock even though billed directly to complainant's sidetrack and plant. But such yardage charges bear no relation whatever to the proper compensation payable simply for the use of the track by the railroad. They were demanded of the railroad, not for its use of the track in carrying traffic generally, but as charges specially assessed against the carriage of livestock. As said above, the provision singling out livestock for the requirement of special compensation was in fact a penalty provision, that is, a provision designed to secure yardage charges on livestock billed and moving to complainant's siding, either by stopping the movement and obtaining payment from complainant, or, if the railroad carried the traffic through as provided in its tariffs and as bills, then as a penalty exacted from the railroad for observing its published tariffs and other

common-carrier duties under the Interstate Commerce Act and the Elkins Act.

It seems evident and, in any event, will be shown that the railroad could not lawfully single out and exclude livestock from the traffic transported over its common-carrier spur. It was, therefore, its duty to retain in its tariffs, as it did, the provision covering and including livestock. The fact that it ignored, and is ignoring, the tariff provision does not absolve it from the duty. The Stock Yards, we must assume, knew that it was dealing with a common carrier subject to regulatory laws. Whatever may be its right to retain the yardage charges collected from complainant in the past, if, pursuant to order entered by us, the railroad resumes the switching of livestock over its spur, it is our opinion that the Stock Yards could not lawfully collect, or the railroad pay, either yardage charges or any other amount of special compensation in effect demanded from the railroad as a penalty for observing its tariffs and other duties under the laws to which it is subject.

The Stock Yards is, of course, entitled to reasonable compensation for the use of its track but this, we believe, does not mean compensation figured on the basis of what would be its stockyards earnings if the railroad's spur No. 245 was not open for the carriage and delivery of livestock to points beyond its yards. Whatever may be the Stock Yards' right to altogether withdraw its track from public use, in our opinion it may not, so long as contracting for its continued public use, exact compensation on any such basis. In any event, here we must look to the present contract and act on the existing practices. We cannot conjecture as to the future arrangements further than to assume that they will be lawful. Under the present contract the New York Central is obligated to maintain track 1619 in good condition and repair but it seems manifest, and we so conclude, that, by resuming its duty to make deliveries of livestock over its spur, it will not incur lawful obligation to pay yardage charges assessed as a penalty if it performs such duty.

For reasons above stated, we concluded that the contract between the New York Central and the Stock Yards, had not changed the common-carrier status of the railroad's spur No. 245 but that the latter remained with respect to its said spur as much subject to the act and its provisions as it was with respect to any other part of its railroad or facilities whereby it performs terminal services at Cleveland or other places. Having in mind that, from the time of its first enactment, a principal aim of the act has been to "cut up by the roots every form of discrimination, favoritism and inequality" (*Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *O'Keefe* v. *United States*, 240 U. S. 294, 297), consideration should perhaps be first given to

paragraph, is a shipper over the line with which the switch connection is desired.

The word "shipper" as used in section 1 (9) is to be given a liberal construction, and includes one receiving traffic from the railroads as well as one offering such traffic for transportation. In either event, Swift comes within the definition as the record shows that the railroads deliver all other classes of freight to the Swift plant over the sidetrack in question, including coal, salt, lumber, et cetera, and move out-bound from the plant over the same track all out-bound shipments which are principally fresh meats and packing-house products. Hence, Swift is a shipper tendering interstate traffic for transportation. The next requirement is that where such a shipper makes such tender, a common carrier by railroad "shall construct, maintain and *operate* upon reasonable terms a switch connection with any * * * private sidetrack which may be constructed to connect with its railroad." The switch connection is actually built and in operation for all traffic other than livestock, and clearly is a part of the railroads' common-carrier facilities as defined in section 1 (3) (a). We can require its operation for livestock upon reasonable terms, provided the connection "is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same." The parties concede that the sidetrack and switch connection fully meet these quoted provisions of the law and that the only obstacle to their use for livestock is the contract discussed herein. We have said that track 1619 is now, and for years has been, devoted to a public use.

As already pointed out herein, it is the general practice of defendants to make industrial deliveries at points in the Cleveland switching district at the line-haul rates to Cleveland, and this practice would have been followed by them in respect of complainant's livestock, as it is now followed on all other carload traffic, were it not for the controversy with the stockyards over the use of track 1619. This is substantiated by the following excerpt from the oral argument of counsel for the New York Central on October 3, 1945:

> It does not make any difference to the New York Central whether this stock is placed at the stockyards' unloading pens or whether it is placed over at Swift & Company's plant. We stand ready to deliver it either place. But because of the barrier placed on this by the stockyards, the owner of the track, we are just not able to deliver over there.

Complainant points out that the New York Central is compelled to absorb unloading charges of $1.25 per single-deck car and $2.50 per double-deck car on all livestock delivered at the unloading pens of the stockyards, and that these charges would be avoided by making deliveries on complainant's siding.

In *Baltimore Butchers Live Stock Co.* v. *P., B. & W. R. Co.*, 20 I. C. C. 124, decided February 13, 1911, we had before us for consideration a situation in respect of deliveries of livestock at Baltimore, Md., practically identical with that before us here. In that proceeding, complainant sought an order to compel the carriers to deliver livestock to its private siding, and to discontinue delivering same in the Union Stock Yards. The latter delivery had been made under a contract between the carrier and the Union Stock Yards designating the Stock Yards as the exclusive point for all livestock delivered in Baltimore. We found that the refusal of defendants to deliver to the sidetrack of complainant livestock consigned thereto was unreasonable and in violation of the law. At page 128 of our report therein, we said:

> Defendants receive the fertilizer and other products of the abbatoir on this track and deliver thereon the coal, hay, grain, and other articles needed by complainant. Moreover, they receive and deliver on this track for at least one other shipper. By long usage and in accordance with the custom of carriers generally, this track is regarded as the point of delivery and receipt of carload freight and we have heard no argument against the use of this track for livestock deliveries, except that this would be a violation of the contract which the carriers have made with the Union Stock Yards. * * * The railroads defendant may not make contracts which abrogate the act to regulate commerce; they may not refuse, because of their own contract, to furnish delivery that is reasonable upon tracks which they use as a terminal for these shippers; they may not discriminate as between commodities in the delivery which they give, where no reason exists for such discrimination excepting the presence of a contract made with a private corporation, as in this case. The amended act to regulate commerce provides that it is the "duty of all common carriers to establish, observe, and enforce just and reasonable regulations and practices affecting all matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property."

Similar observations are warranted upon the facts of record here. While the spur track in question there was owned entirely by the railroad, we do not consider this as having any legal significance in view of the operation and free maintenance of track 1619 here by the New York Central.

We find that the complainant has made application in writing to the carrier for the operation of the switch connection discussed and has tendered interstate traffic to such carrier; that the New York Central has refused to maintain or operate such connection for the transportation of livestock to complainant's plant; that the facts shown above depicting operation over the track for a number of years for the transportation of livestock and since used for the transportation of commodities other than livestock shows that the connection is practicable and may be made with safety and such refusal constitutes justification for the connection, and that the number of carloads of livestock which complainant is ready and willing to have

transported by railroad will furnish reasonable compensation to the carrier with whose line the connection is made, in this case the New York Central. We also find that the failure or refusal of the defendant, New York Central, to furnish cars for the movement of livestock traffic to complainant's plant at Cleveland, Ohio, while furnishing cars for the movement of other classes of traffic, constitutes a discrimination against Swift & Company within the meaning of this section. Consequently, we find that a violation of section 1 (9) of part I of the Interstate Commerce Act follows. This paragraph forbids discrimination against any shipper, resulting from a failure on the part of the carrier to comply with its requirements. The facts show such a violation against the complainant, resulting from defendant's failure to accept and transport its shipments of livestock over the connection under the circumstances discussed in this report.

An appropriate order will be entered.

BARNARD, *Chairman*, dissenting:

The majority finds the refusal of defendants to deliver to the sidetrack of complainant at Cleveland, Ohio, livestock shipments consigned thereto, while contemporaneously providing such service to complainant's competitors, to be an unreasonable and unlawful practice in violation of section 1 (6), to be in violation of section 1 (9), and to be unduly prejudicial and preferential in violation of section 3 (1) of part I of the Interstate Commerce Act.

In my opinion the majority's construction of the word "practices" in section 1 (6) of the act is in conflict with the construction placed thereon by the Supreme Court in *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 228. The Supreme Court, among other things, held that no power was given to this Commission to order a carrier to provide and furnish tank cars that it did not possess even though section 1 of the act defined the term "transportation" as including "cars * * * irrespective of ownership or of any contract" for the use thereof, and made it the duty of every common carrier "to furnish and provide such transportation upon reasonable request therefor." Following the reasoning of the Supreme Court, it is my view that the failure of the railroad to acquire the use of track 1619 to transport livestock to complainant's plant is not a practice within the meaning of section 1 (6).

Section 1 (9) provides:

> Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where

such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission other than orders for the payment of money.

This proceeding does not concern the construction, maintenance, or operation by the New York Central of a switch connection between its track and the private sidetrack adjoining complainant's plant. Such a connection has been maintained and operated by the New York Central for many years under an agreement with complainant. The only question before the Commission in this proceeding relates to the use of 1,619 feet of track constructed in 1899 by the Cleveland Union Stock Yards Company, hereinafter referred to as the Stock Yards, on land owned by it.

Complainant's packing plant extends from West Sixty-third Street on the east to West Sixty-fifth Street on the west and is directly across Sixty-fifth Street from the stockyards. The main line of the New York Central runs northeast and southwest some distance north of complainant's plant and along the northern boundary of the stockyards. Leading south from the main line and just west of Sixty-fifth Street is a spur track of which the initial 132 feet is owned and operated by the railroad. This spur then continues 1,619 feet south over tracks and land owned by the Stock Yards but maintained and operated by the railroad, hereinafter called track 1619. Continuing south of track 1619 and connecting with it is another railroad owned spur, about 793 feet long. This section forms a wye, then crosses Sixty-fifth Street and swings northeast to the west side of Sixty-third Street, thence north just west of that street to complainant's siding and the sidetracks of three other industries including a packing plant operated by Koblenzer Brothers. This spur track affords the only rail connection between the railroads serving Cleveland and these four industries and three others located west of Sixty-fifth Street, all south of the main line.

On May 10, 1899, the Stock Yards and the New York Central entered into an agreement for the construction of track 1619. The Stock Yards did the grading, agreed not to authorize third parties to use the track without the railroad's consent, and became the owner

thereof. The New York Central laid the track and maintained it at the Stock Yards' expense. The railroad was given the right to use the track, without cost, for business other than that of the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The railroads reserved the right, after 60 days' notice in writing, to discontinue the use of the track and to remove the connections. The above-mentioned agreement was superseded by another of June 16, 1924, confirming the Stock Yards' ownership of track 1619 and providing for the maintenance thereof by, and at the expense of, the railroad. The free use of that track by the railroad was stated to be in consideration of maintenance. That agreement provided for its termination by either party on 30 days' written notice, but did not provide specifically that railroad use of the track should not interfere with the Stock Yards' business.

Effective February 1, 1935, after 30 days' notice in writing, the agreement of June 16, 1924, was amended to prohibit the free use of track 1619 for "competitive traffic," construed by the parties to mean livestock, "a charge for which use shall be the subject of a separate agreement." The Stock Yards then demanded on livestock delivered over track 1619 to chutes of complainant and other specified parties the charges named in Stock Yards tariff No. 5 applicable to livestock consigned through the Stock Yards direct to packers and not offered for sale, ranging from 5 cents per head on sheep to 20 cents per head on cattle, or from $6 to $9 per carload. On September 7, 1938, the Stock Yards' charge became $5 per deck. No agreement concerning such charges was reached between the railroad and the Stock Yards, and on November 12, 1938, the switching charge of the New York Central was made inapplicable to livestock. In the meantime, defendants had discontinued deliveries of livestock to complainant's siding. The carriers considered the charges demanded by the Stock Yards prohibitive as compared with a reciprocal switching charge of $3.47 per car then maintained by the railroads. By letter of August 14, 1941, complainant demanded that the line-haul carriers deliver livestock to its siding, which demand was refused. Complainant has since billed its livestock to its siding, which instructions defendants have ignored. Delivery has been tendered and accepted under protest at the unloading pens in the stockyards.

From September 6, 1910, until January 1, 1930, complainant received its livestock at the Stock Yards and drove the stock across the street for immediate slaughter. Between January 1, 1930, and February 1, 1935, the New York Central delivered 1,161 carloads of livestock on complainant's siding, on which the Cleveland line-haul rates were charged under appropriate tariff provisions. Even during that period, complainant also received 2,260 carloads through the stock-

yards. In 1934 when the volume reached substantial proportions, the Stock Yards took steps which in effect prohibited the use of track 1619 for the transportation of livestock to others. This action was taken because Swift had been using that track to divert a substantial part of the Stock Yards' business of providing holding pens and other facilities enabling complainant to drive its livestock within the yards to the exit immediately across the street from complainant's plant.

As stated, the railroad transports all classes of freight, except livestock, to and from Swift's siding over track 1619. These other commodities are not competitive with livestock; and unlike livestock, these other commodities are not competitive with the Stock Yards' business. Moreover, I do not believe that the alleged preference of commodities other than livestock is undue under section 3 (1) because complainant is clearly benefited by use of the track for switching its traffic other than livestock.

The railroad switches livestock to sidings of three of Swift's allegedly preferred competitors in Cleveland, but those competitors, unlike Swift, reach the New York Central directly, and do not require the use of track 1619 or any other private track of the Stock Yards, as does Swift. Those competitors are not being preferred through use of that track. In fact, the railroad is prohibited from using track 1619 for livestock. No such prohibition exists with respect to the transportation of livestock to the plants of the three alleged competitors. It would not benefit Swift if that track was altogether withdrawn from use. Owing to this substantial dissimilarity of facts, the alleged preference of Swift's competitors, in my opinion, is not undue within the meaning of section 3 (1) of the act.

The evidence does not disclose any well-established or long-continued custom of free use of track 1619 for livestock. There was no public dedication of track 1619 by easement—instead the Stock Yards specifically reserved the right to terminate the sidetrack agreement. The Stock Yards has carefully guarded its control over the use of that track. So far as livestock traffic is concerned track 1619 clearly is a private track. The Commission has no authority to require the railroad to exercise a greater right in the track than it in fact possesses. The condemnation of private tracks for public use is a matter for decision by the courts and not by this Commission.

To require the railroad to acquire either tracks or trackage rights to handle livestock over track 1619 would amount in effect to requiring an extension of the railroad contrary to sections 1 (18) to 1 (22) which specifically provide that the Commission's authority shall not extend to the construction or abandonment of spur, industrial, team, switching, or sidetracks located or to be located wholly within one State.

Section 1 (9) relates to switch connections only and not to the extension of trackage rights over sidetracks. Compare *Cleveland, C., C. & St. L. Ry. Co.* v. *United States*, 275 U. S. 404, at pages 408 and 409.

Beginning September 14, 1907, complainant and certain other industries negotiated for a direct spur from the New York Central's main tracks at Sixty-third Street, thence south over Sixty-third Street and across private land of the Lake Erie Provision Company to complainant's plant. A city ordinance to cross Sixty-third Street was obtained on May 25, 1908, and in May 1909 the court condemned the private land, awarding $13,500 damages. This made the total estimated cost of the track about $24,500. The track was not built as the interested parties were unwilling to bear so great an expense. If that project had been consummated the use of track 1619 would not have been necessary in order for the New York Central to reach complainant's siding.

In view of the fact that track 1619 is owned by a private industry, not a common carrier by railroad, the Stock Yards is clearly within its legal rights in restricting the use of that track in such manner as to prevent Swift from interfering with the business of the Stock Yards.

It therefore follows that that track being privately owned and not having been condemned by any condemnation proceeding, the sole right of determining the use thereof remains in the Stock Yards. There is no jurisdiction in the Commission to require the Stock Yards to permit the New York Central to use the track for any purpose unless such use is agreeable to the Stock Yards.

In my opinion, the complaint should be dismissed.

I am authorized to state that COMMISSIONER PATTERSON joins in this expression.

SPLAWN, *Commissioner*, dissenting:

I dissent from the finding that there is a violation of section 3, because, in my opinion, the circumstances and conditions surrounding the transportation of livestock to Swift's private siding are not substantially similar to those surrounding the transportation of livestock to the private sidings of Lake Erie Provision Company, Long Dressed Beef Company, and Ohio Provision Company. The plants of the latter companies are outside of the stockyards and are served by defendants without using tracks owned by the Stock Yards. In order to reach Swift's siding, defendants must use track 1619, which is owned by the Stock Yards Company, and whose use by defendants for the transportation of livestock has been prohibited. No such prohibition exists with respect to the transportation of livestock to the plants of the three companies above named. This difference in circumstances and conditions precludes a finding under section 3. Nor do I believe

that the preference that may be caused by the permission to use track 1619 for all traffic except livestock is undue because complainant is clearly benefited by use of the track for switching its traffic other than livestock.

The finding of a violation of section 1 (6) is apparently based upon the conclusion that the provision of the contract between the Stock Yards Company and the New York Central excepting livestock is a "penalty" provision which changes and nullifies the laws under which the New York Central operates and that, therefore, the provision is of no legal force and effect. I am unable to agree with the finding or with the conclusion upon which it is based. Track 1619 is owned by the Stock Yards Company and is constructed on its land within the stockyards property. It has not been dedicated to the public, and therefore its use may be restricted, in whole or in part, by its owner. There is an inference in the majority report, twice mentioned, that the Stock Yards Company may have the right to withdraw altogether its track from public use. If it has such authority over the track, it seems to me that it has the right to restrict its use.

While section 1 (9) provides that the carrier shall operate switch connections with private sidetracks which may be constructed to connect with its railroad, there is no express language in the section requiring the operation of the sidetrack in instances where such operation is prevented by conditions not imposed by the carrier and beyond its control. This report does not contain conclusions of fact and findings on which it is possible to give complainant relief under section 1 (9).

COMMISSIONER ATTCHISON did not participate in the disposition of this proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 223.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
and SWIFT & COMPANY,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
and THE CLEVELAND UNION STOCK YARDS COMPANY,
Appellees.

MOTION TO AFFIRM
and
BRIEF IN SUPPORT OF MOTION.

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INDEX.

MOTION TO AFFIRM 1

BRIEF IN SUPPORT OF MOTION 3

Jurisdiction 3

Statutes Involved 4

Basic Issues 4

Argument 7

Elkins Act 21

Conclusion 25

Certificate of Service 27

APPENDIX 28

AUTHORITIES CITED.

Cases.

Alabama Central R. Co. v. Alabama Public Service Co., 200 Ala. 536, 76 Sou. 862 12

Alexander King Stone Co. vs. Chicago I. & L. Ry. Co., 160 I. C. C. 245 15

Certain-Teed Products Corp. v. C. R. I. & P. Ry. Co., et al., 68 I. C. C. 260 16

Ellis v. I. C. C., 237 U. S. 434 25

Fort Worth Stockyards Co. vs. Brown, 161 S. W. (2d) 549 19

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422 24

Greenlee Foundry Co. vs. Borin Art Products Co., 379 Ill. 494 9

Limits Industrial Building Corp. et al. v. B. & O. C. Term. Co., 258 I. C. C. 438 ..... 8, 9

Nutile Fruit Co. v. Boston & M. R. Co., 155 I. C. C. 221 16

Pennsylvania R. Co. v. Public Utilities Com. of Ohio, 298 U. S. 170, 80 Law. Ed. 1130 22

Refrigerator Car Mileage Allowances, 232 I. C. C. p. 276 24

Rex Jellico Coal Co., et al. vs. Louisville & Nashville Ry. Co., 237 I. C. C. 67, decided January 10, 1940 15

Sholl Bros. v. Peoria and P. U. Ry. Co., 276 Ill. 267, 114 N. E. 529 10

U. S. and I. C. C. vs. Pennsylvania R. Co., 242 U. S. 208 20

Winnsboro Granite Corporation vs. Southern Ry. Co., 176 I. C. C. 481 15

Text.

Elliott on Railroads, Vol. 1 (2d ed.), Sec. 457 14

Statutes.

Elkins Act:
Sec. 2 (49 U. S. C. A. 42) 4, 21, 23, 24

Interstate Commerce Act:
Sec. 1(a) 22
Sec. 1(1) 23
Sec. 1(3) 22, 23
Sec. 1(3a) 4, 7
Sec. 1(6) 4, 5
Sec. 1(9) 4, 8

Judicial Code as Amended, Sec. 210 (Sec. 47a of 28 U. S. C.) 3

Title 49 U. S. Code:
Sec. 1(3)(a) 28
Sec. 1(6) 28
Sec. 1(9) 29
Sec. 3(1) 29
Sec. 42 30

Transportation Act of 1920:
Sec. 1(22) 8

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THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
and THE CLEVELAND UNION STOCK YARDS COMPANY,
Appellees.

MOTION TO AFFIRM.

Come now the appellees, The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, The Erie Railroad Company, The Wheeling and Lake Erie ~~Railroad~~ Company, The New York Central Railroad Company and The Cleveland Union Stock Yards Company, and move the court to affirm the decree below in the above entitled cause or, in the alternative, to dismiss the appeal therefrom, for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. (Rules 12(3)

and 7(3, 4) Rules of Practice of the Supreme Court of the United States.)

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In the Supreme Court of the United States

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and THE CLEVELAND UNION STOCK YARDS COMPANY,
Appellees.

BRIEF IN SUPPORT OF MOTION.

The statutory three-judge District Court's Findings of Fact and Conclusions of Law in this case are set out verbatim in the transcript of record. The facts upon which the Court decided this case are not in dispute and appellees contend that the conclusions of law, upon which the order and judgment are based, are so sound and logical in the application of elementary principles that reasonable minds can come to no other conclusion.

JURISDICTION.

The final judgment in this case in the District Court involving an order of the Interstate Commerce Commission is permitted to be taken by direct appeal to the Supreme Court under Sec. 210 of the Judicial Code as amended (Sec. 47a of 28 U. S. C.).

STATUTES INVOLVED.

The particular statutes involved in this case come within the Interstate Commerce Act,—Secs. 1(3a), 1(6), 1(9) and 3(1) of 49 U. S. C., and the Elkins Act, Sec. 2, 49 U. S. C., Sec. 42, which are appended hereto.

BASIC ISSUES.

The Interstate Commerce Commission (hereinafter called the "Commission") had assumed the power and authority

(1) to order the railroad companies, appellees herein, to commit a trespass by ordering them to operate over a certain sidetrack owned by The Cleveland Union Stock Yards Company (hereinafter sometimes called the "Stock Yards Company") and located on its own land, in violation of written contracts in which the Stock Yards Company granted The New York Central Railroad Company (hereinafter called "New York Central"), a common carrier, permission to make limited use of said track in order to reach the plant of Swift & Company, and other industries, and

(2) to deprive the Stock Yards Company of its property by ordering a virtual appropriation of such land and track, without compensation, to the use and benefit of Swift & Company.

With such a patent abuse of the Commission's assumed jurisdiction over basic principles of law summarily disposed of by the District Court's first two Conclusions of Law, the other questions are of relatively minor importance. However, they may be stated as follows:

1. Has the Commission the constitutional power to declare the appropriation of property of Stock Yards Company to the use and benefit of Swift & Company?

2. Has the Commission the power and authority to:

(a) declare that the track constructed and owned by the Stock Yards Company for its benefit and use, and located on its land, is a part of the New York Central System, simply because the Stock Yards Company permitted limited use of said track for the benefit of Swift & Company, and other industries, under the terms of a written contract, which, nevertheless, at all times, consistently, constantly and notoriously, preserved the Stock Yards Company's ownership and control thereover and was terminable on 30 days notice by Stock Yards Company?

(b) enlarge the privileges and burdens of the private sidetrack agreement between Stock Yards Company, a non-carrier corporation, and New York Central, and to order the Stock Yards Company to utterly disregard the provisions of said sidetrack agreement and desist from the practice of asserting or exercising complete ownership of and control over its property?

(c) order Stock Yards Company, which is a non-carrier corporation and which does not operate a railroad "to establish and put in force * * * and maintain in force thereafter a schedule or schedules providing for the delivery to the sidetrack of complainant (Swift & Company) in Cleveland, Ohio, of its interstate shipments of livestock carried over defendant's lines and consigned thereto."?

(d) order the railroad companies, appellees herein (four of which railroads do not have any tracks serving Swift & Company), under provisions of Sec. 1(6) of the Interstate Commerce Act,

> "to establish and put in force * * * and maintain in force thereafter a schedule or schedules providing for the delivery to the sidetrack of complainant (Swift & Company) in Cleveland, Ohio, of its interstate shipments of livestock carried over"

the lines of the railroad companies, appellees herein, and consigned to Swift & Company's plant when said private

sidetrack belonging to the Stock Yards Company (and which, prior to 1938, was used in making delivery of carload shipments of livestock to Swift & Company's plant) is available to the railroad companies, appellees herein, only for the limited use which is permitted under the written agreement between New York Central and Stock Yards Company?

(e) change or modify a valid, existing private sidetrack agreement between the New York Central and Stock Yards Company and penalize the latter by ordering the taking of its property for the benefit of Swift & Company, (which company has not provided its own direct sidetrack connecting with the main line right of way of the New York Central), thereby enabling Swift & Company to receive shipments of livestock which the Stock Yards Company considers to be competitive to its business of operating a livestock market?

(f) Is not the determination of questions 1, 2(a), (b), (c), (d) and (e) within the jurisdiction of the courts under the constitution, and beyond the powers of the Commission?

3. Has the Commission the power and authority to:

(a) declare that the property of the Stock Yards Company was devoted to public use when at all times it (Stock Yards Company) "constantly, consistently and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track"?

(b) order a plant delivery service to be rendered to Swift & Company, under the provisions of Sec. 1(9) of the Act, when Swift & Company has not provided and does not have, nor maintain, its own direct sidetrack connection with New York Central's main line right of way, which service, under the provisions of Sec. 3(1) of the Interstate Commerce Act, would amount to a preference over other shippers in similar businesses who have built, and maintain, their own sidetracks connecting directly with the railroad's main line right of way?

(c) lawfully determine that a private sidetrack is part of a railroad system, under the provisions of Sec. 1(3)(a) of the Interstate Commerce Act, where a carrier is granted the use of said private sidetrack only under the terms of a written contract strictly defining the limited uses permitted thereunder?

(d) lawfully order a railroad in the circumstances set up in question 3(c) to commit a trespass by ordering it to continue using said private sidetrack for the benefit of another shipper (Swift & Company) where there is a legal or physical obstacle preventing such use, or to order the carrier or any other party to take steps to remove such obstructions?

4. Does the Interstate Commerce Commission, under the Elkins Act, have the power and authority to order The Cleveland Union Stock Yards Company, a non-carrier corporation, to publish rates and provide a service to Swift & Company, a private corporation, as it did under its order dated May 3, 1946?

ARGUMENT.

The view of the appellees is that the preliminary reports by the Examiners of the Interstate Commerce Commission answered the above questions correctly. Their interpretation of the issues and the solution thereof were affirmed by the statutory three-judge district court, which recognized the elementary principles of law applicable to the foregoing questions. However, the Commission's findings and final report and order entirely ignored and disregarded the elementary principles of law applicable to this controversy, which the statutory three-judge district court held to transcend the jurisdiction of the Commission and accordingly and properly decreed that said report and order be set aside. Reference is therefore made to the Court's Findings of Fact and Conclusions of Law for sound judicial reasoning applicable to this controversy.

A search of the powers granted to the Commission does not disclose the delegation of any power whatsoever to order the appropriation of the property of one person to the use of another; in fact, Sec. 1(22) of the Transportation Act of 1920 provides that the authority of the Commission "shall not extend to the construction or abandonment of spur, industrial, team, switching or sidetracks located or to be located wholly within one state." Thus, the Commission being without any jurisdiction over the construction or abandonment of this sidetrack under its enabling act, and certainly having no such powers under the common law, it could by no means have any powers to effect any appropriation of property under the guise of requiring service to be rendered to a shipper, under the provisions of Sec. 1(9) of the Interstate Commerce Act, over a private sidetrack owned by another shipper or industry, which owns the land upon which it is constructed and controls the use of said private sidetrack.

In taking an affirmative position with respect to the foregoing questions, the Commission wrongfully assumed power and authority, relying upon certain stated provisions of the Interstate Commerce Act. That such provisions are not applicable to the facts herein is illustrated by the Commission's own interpretation in similar cases before it, by the Supreme Court's decisions on appeals from the Commission's orders, and by certain outstanding state court decisions, to-wit:

Limits Industrial Building Corp. et al. v. B. & O. C. Term. Co., 258 I. C. C. 438, wherein it was said that:

> "Defendant's failure to continue freight service to and from an industry at Cicero, Ill., over certain switching and private industrial tracks previously constructed and in operation, and its refusal to operate over such tracks, under existing circumstances, not shown to be unlawful. Complaint dismissed."

At page 441 of the *Limits* case, the Commission said:

"• • • Common carrier services over private sidings and private industrial tracks can not be expected, and certainly can not be compelled, *where obstructions against the use thereof,* either legal or physical, *not caused by a carrier,* prevents it from entering upon those tracks. Nor is it within our jurisdiction to order a carrier nor any other party, to take steps to remove such obstructions."

Part of the property rights involved in the *Limits Industrial* case is considered in the decision in *Greenlee Foundry Co. vs. Borin Art Products Co.*, 379 Ill. 494, and a reading of this case is helpful in considering the complete picture of the *Limits Industrial* case.

In the *Limits Industrial* case, the B. & O. C. T. switch connected with the spur track of Limits, under an agreement dated April 30, 1937, between the B. & O. C. T. and Limits, Limits regulated the right of use of its spur track by Borin Art Products Co. Limits owned that track beyond the B. & O. C. T. right of way. When the court enjoined the B. & O. C. T. from rendering any service over that track, the complainant sought in the action before the Interstate Commerce Commission to compel the rendering of the service. The B. & O. C. T. was willing to render such service if the legal obstacles were removed, but the Commission held that where there were obstacles against the use of the track, either legal or physical, not caused by the carrier, the carrier can not be expected or compelled to render services over such private sidings and private industrial tracks.

In the present controversy Stock Yards Company is an industry on New York Central and has its own private side track on its own land, and regulates the use of its track by Swift & Company and other industries reached thereby, the same as Limits did in the case under discussion. New York Central is willing to render the service of delivering shipments of livestock to Swift's plant if the restrictions

to the use of Stock Yards track is removed, which is substantially similar to the circumstances in the *Limits* case.

Sholl Bros. v. Peoria and P. U. Ry. Co., 276 Ill. 267, 114 N. E. 529, which is based upon facts almost identical to those in the instant case. In that case Sholl Bros. in 1896 entered into a written agreement with the Peoria & Pekin Union Ry. Co. (hereinafter referred to as the Peoria) whereby the railway agreed to put in a sidetrack from its main track to Sholl Bros.' coal mine about to be opened and operated by them. The contract between Sholl Bros. and the railroad provided that Sholl Bros. should furnish the right of way, grading and bridging from the main track to the mine, do all the grading and bridging necessary for the track at the mine and pay $300.00 as their portion of the first cost of the ties to be used in constructing such sidetrack. The railroad company agreed to furnish the balance of the track material and lay the sidetrack and necessary mine tracks and to maintain such tracks at its own expense, in return for which the railroad company was to have at all times exclusive use of said tracks and right of way. The railroad was also given the right to use said right of way and tracks in handling the business of, or for the purpose of making connections with, any other industry, *except coal mine*, that might thereafter be located adjacent to said right of way, provided said railway company:

> "shall always do such other business in a manner which shall not interfere with Sholl Bros."

There were no industries other than the Sholl Bros.' mine adjacent to, or reached by, this right of way at the time of its construction. However, before the track was laid a site for a state asylum for the insane had been chosen just beyond the land of Sholl Bros., and the asylum was established by the State on that site. The asylum commissioners built railway tracks on the asylum grounds and connected them with the track on Sholl Bros.' land, after which the

track on Sholl Bros.' land was used for the transportation of freight to the asylum.

Sholl Bros. furnished coal to the asylum which was delivered over the track on its land and in some instances coal which was produced at some mine other than Shall Bros.' was delivered to the asylum, but in each case of such delivery the Peoria requested and received the special permission of Sholl Bros. to move this latter coal over the Sholl Bros.' track to the asylum. This practice continued uniformly until 1911 when Peoria issued a tariff showing a rate for the delivery of coal over Sholl Bros.' track to the asylum and announced that such service was open to all persons who might demand it. Thereafter coal from the Wolschlag Co-operative Coal Co., located on Peoria's railroad, was delivered over said track to the asylum. Whereupon Sholl Bros. filed court action and secured an injunction against the transportation over said track and right of way of coal not mined on their lands or under their coal rights.

In the trial Sholl Bros. contended that by the terms of the contract coal mines generally were excepted from the industries whose business the Peoria could handle over this track or make connections with, and that Peoria was precluded by the terms of the contract from transporting any coal over the track except the coal from the mine of Sholl Bros. *The Court sustained this interpretation, not only upon the terms of the contract themselves, which the court found to be somewhat ambiguous, but mainly upon the construction of the parties themselves as shown by their acceptance, acts and other extrinsic circumstances.* The court affirmed judgment for Sholl Bros. upon the following grounds (p. 531):

> "• • • *It must be remembered in this connection that the railway company does not own this right of way.* The fee in the land and right of way is owned by the defendants in error, *and the right of the railway company to*

use the tracks and right of way is restricted to whatever rights it has by the terms of the contract." (Emphasis ours.)

(p. 532):

"* * * *The sidetrack involved in this case is not a part of the public railway of plaintiff in error. It is connected with said railway, but not a part of it, and could not become a part of the railway system of plaintiff in error, unless* it be purchased or *acquired by condemnation proceedings.* As hereinbefore pointed out, the right of way on which the track was built is the private property of defendants in error, *and the right of the railway company therein is limited and governed by the provision of the contract that has been considered.*" (Emphasis ours.)

(p. 533):

"It would doubtless be of advantage to the State to be allowed to ship coal over this sidetrack to the asylum, but there is nothing in the circumstances of this case which gives the State any greater rights than an individual would have similarly situated."

Alabama Central R. Co. v. Alabama Public Service Co., 200 Ala. 536, 76 Sou. 862. There the Manchester Sawmill Company (not a party to the action) was a private corporation engaged in the lumber business and owned and operated a logging railroad extending for several miles into a belt of pine timber which it cut into lumber and then transported over said railroad to its mills.

In April, 1915, Alabama Central Railroad Company entered into a contract with the Sawmill Company whereby the railroad acquired the license or right to operate its trains and service over the logging railroad for the purpose of carrying freight and passengers for hire, but it did not acquire the right to haul or transport pine logs or pine lumber of such logging railroad except for its own use. The Sawmill Company retained the paramount right to the use of the track, to the end that it should not be delayed in

the transaction of its own business. It also retained or reserved the right to take up the track or change the location thereof at its will and pleasure and was under no duty to keep the logging railroad in such repair as would be suitable for operating trains thereon. The railroad company had the right under certain conditions to repair and keep up, and under certain other conditions to purchase, the tracks and the rights of the Sawmill Company, as well as to use other property of the Sawmill Company subject to the Sawmill Company's reasonable regulation.

In October, 1916, Aaron and McNeal, a partnership, applied to the Alabama Public Service Commission to require the Alabama Central Railroad to put a sidetrack on the logging railroad of the Sawmill Company for the use of the partnership in transporting pine lumber and other shipments via the railroad. The railroad company was ordered to put in such sidetrack. The Sawmill Company refused to consent to such construction and the railroad filed an action to enjoin enforcement of said order, to which the Public Service Commission demurred and the trial Court sustained its demurrer.

The Alabama Supreme Court held:

> "If it be conceded that the contract * * * is void be reason of the stipulation that the carrier should not haul pine logs or pine lumber over the logging road, or for other reasons, this would not authorize the Public Service Commission to require appellant to violate its void agreement, or to trespass upon, or use without authority, the property of the logging company. * * * Neither the Commission nor the courts have the power to make or alter contracts between parties. * * * but where the carrier does not own or control the track which it uses, but uses the same as a mere licensee, or under an agreement such as is found in this case, the Commission nor the Courts cannot authorize, much less compel, the carrier, thus operating under a mere license, to improve or change the main lines, side tracks, or the loading facilities of the line over which

it is so operating, without right of control, but with the mere right to repair and keep up the lines, as in this case."

* * * * *

"* * * Here, however, the road involved is a private road and not a public one, and those who own, and have the exclusive control of it, are private individuals or corporations, who have merely consented or agreed that appellant, a public service corporation, may use it under certain restrictions and regulations. It may be, as we have said, that this contract or agreement is void, because against public policy; but, if so, it cannot be relieved against by compelling the parties to make a new contract, nor by compelling them to so modify it as to make it legal and binding on both parties."

* * * * *

"* * * appellant not only has no right to do what the Commission has ordered it to do but is under contract or agreement not to do that identical thing; and, should it obey the Commission's order, it would forfeit all right to use any part of the logging road, and be subject to suit for damages by the owners of the road, and if it built the side track voluntarily it would be a trespasser. Unquestionably, the Commission has no power to compel appellant to be a trespasser nor to exempt appellant from liability, should it build the side track, as for a trespass. Nor would the Commission's order to build the side track have the effect to make its construction rightful and lawful."

The Court quoted from *Elliott on Railroads*, Vol. 1 (2d ed.), Sec. 457, substantially to the effect that if the lease were void as against public policy, it neither confers a right nor creates a duty.

The Court further said:

"* * * Here appellant does not own the main line of the logging road, nor even the ties and the rails, much less the right of way, and has no control thereof, except to run its trains thereover, and to repair the same strictly for the purposes and under the rights acquired by its contract. If its contract is valid, it has

agreed not to do what the Commission requires it to do. If its contract is void, it has no right to use the logging road for any purpose, much less to put in or use a side track on the right of way of the logging road. While under the contract it has the option to buy the logging road, the courts cannot compel it to exercise the option. If the facts averred in the bill are true, it would be utterly useless to compel appellant to put in a side track, for the reason that the logging company, who own the land and the road, would not only remove it, but also the main track at that point, and absolutely prevent its use by appellant for the purposes intended by the order."

In *Rex Jellico Coal Co., et al. vs. Louisville & Nashville Ry. Co.*, 237 I. C. C. 67, 70-71, decided January 10, 1940, the Commission held:

"* * * Service over private tracks by a common carrier subject to the Commission's jurisdiction is neither compelled nor prohibited by the Act. To furnish it or withhold it is within the discretion of the carrier, except that in either event the statutory inhibition against unjust discrimination or undue prejudice must be observed." *Winnsboro Granite Corporation vs. Southern Ry. Co.*, 176 I. C. C. 481, 483."

In the *Winnsboro* case the plaintiff contended, as Swift does in this complaint, that the transportation operations over the private track should be regarded as a terminal service similar to that performed to other competing quarries.

In *Alexander King Stone Co. vs. Chicago I. & L. Ry. Co.*, 160 I. C. C. 245, 257, the Commission said:

"* * * The law imposes no duty and confers no right upon a carrier to operate over privately owned tracks without the consent of the owner, and accordingly, no such right could be asserted by a carrier as a condition to the performance of common-carrier duties."

In *Nutile Fruit Co. v. Boston & M. R. Co.*, 155 I. C. C. 221, the Commission held that there was no obligation upon the carrier to deliver upon a particular public delivery track within the juice-grape yards, and characterized the demand of the shipper (which the Commission rejected) in this manner (p. 223):

> "Complainant's reason for alleging that the carrier's failure to place the cars on the designated tracks is an unlawful practice is, apparently, because such placements were specified in its individual contracts of transportation. In short, it is sought to charge the carrier with special contract liability in respect of transportation undertaken under published tariffs. The tariffs called for transportation to Boston and there was, too, the carrier's duty to make reasonable tender of the freight at an accessible point. St. Louis, Mo. (Cupples Station) Terminal Regulations, 40 I. C. C. 425, 432. All this was performed and the only complaint is of failure to perform the further service, alleged to have been specially contracted for, of delivering the cars on the particular tracks designated. The service to which shippers are entitled under published tariffs can not be enlarged by private contract. *Chicago & Alton R. R. Co. vs. Kirby*, 225 U. S. 155. Moreover, it is clear that the right to select the most accessible tracks within a team-track terminal yard is one that could not be made open and available to all shippers, at least not when that yard is being regularly employed, and, accordingly, such right would constitute a special privilege or advantage which the carrier could not lawfully give to an individual shipper."

An important case is *Certain-Teed Products Corp. v. C. R. I. & P. Ry. Co., et al.*, 68 I. C. C. 260, wherein complainant contended that it was the duty of the Rock Island to furnish, as a facility used by it in transporting traffic to and from complainant's plant under through rates, a spur track which extended for about 2000 feet from the complainant's plant, and the plants of two other industries.

adjacent thereto, to the tracks of the Rock Island. This track was built by the Rock Island for a certain plant and under the construction contract the Rock Island agreed to pay $1 per car to the owners of the track if it should use the track for the purpose of transporting thereon the traffic of certain industries. Title to the track was later conveyed to the Chicago, Ottawa & Peoria (hereinafter referred to as the Peoria) which was a small electric common carrier subject to the act and which filed tariffs with the Commission and participated in joint rates on interstate traffic with carriers other than the Rock Island. The Commission stated the issue and its conclusion as follows (pp. 261-263):

"• • • The Rock Island provides the motive power for moving traffic from and to industries on this track. In its tariffs the Rock Island shows complainant's plant as a destination on its own line, and there is no provision that any extra switching charge will be assessed for movement from and to the same. There is no provision in any tariff for the assessing of this $1 charge.

"Complainant contends that the assessment thereof is unlawful under Section 6. It further contends that it is the duty of the Rock Island to furnish this track as a facility used by it in transporting traffic to and from complainant's plant under through rates; that such through rates of the Rock Island, which include service to and from the plant, must be presumed to be adequately compensatory for all services performed; and that the additional charge paid by complainant renders the total charges unreasonable to the extent of $1 per loaded car.

"• • •

"The previous owner of this track did not move any traffic over it, and the relationship that existed between it and the predecessor of complainant was not that of shipper and common carrier. The situation was simply one wherein an owner of a track granted the use thereof to various industries as a means of connecting with the trunk line, and exacted

compensation therefor. The evidence does not indicate that the Peoria's acquisition of the track resulted in any change in the relationship that previously existed between track owner and shipper. The Peoria merely continued as the naked owner of the title to the track, performing no common-carrier service in connection therewith. The fact that the Peoria is a common-carrier corporation subject to the act generally does not operate as a bar to its engaging in lawful business activities other than common carriage. Charges in connection with such activities are not a proper subject of tariff publication. In this connection it should be noted that the Peoria attempted to file a tariff effective April 21, 1921, wherein it provided a charge of $2, to be assessed by it on all loaded cars handled at Marseilles by the Rock Island over the Peoria's tracks. This tariff was rejected by us on the ground that it sought to make a charge for services performed by another carrier. The fact that payment is made per car perhaps makes it savor somewhat of a transportation charge. But this is simply a convenient method of measuring the amount to be paid by complainant for the use of the track. The nature of the transaction is the same as if the amount were fixed at a certain sum per annum.

"The contention that the track in question is a facility of the Rock Island which it is the duty of that carrier to furnish, is equally untenable. *There is no duty on the part of a common carrier subject to the act to provide tracks off its lands to effect connection with an industry. If an industry desires connection with a trunk line, the duty devolves upon it to make arrangements for the procuring of a spur. Paragraph 9 of Section 1 makes it the duty of a common carrier under stated circumstances to construct, maintain, and operate, upon reasonable terms, switch connections with private sidetracks which may be constructed to connect with its rails by shippers tendering interstate commerce. But this duty does not arise until the shipper has provided the side track. Ralston Townsite Co. vs. M. P. Ry. Co.*, 22 I. C. C. 354. In the instant case complainant's predecessor and concerns

similarly located, instead of constructing their own switch tracks up to the Rock Island right of way, elected to enter into an agreement with a third party for the privilege of being served by a then existing track, to which arrangement complainant has succeeded. It is true, as previously indicated, that the Rock Island has moved certain building materials over this track to the interchange with the Peoria destined to a consignee at a point beyond Marseilles. This is a temporary arrangement, the details of which are not clearly shown. It cannot be said to change in any way the character of this track with relation to complainant. The amount of consideration that complainant pays for the use of this track is a matter of private contract.

"Complainant's allegations of undue prejudice and unjust discrimination are founded upon the fact that industries at other points receive and ship their traffic at the flat rates applicable from and to the particular point, and are not required to pay the additional trackage charge; but *there is no evidence to show that industries located at such points operate under trackage arrangements similar to those existing between complainant and the Peoria.* (Emphasis ours.)

"We find that the collection of the charge assailed does not constitute a violation of the Interstate Commerce Act, and that we are without jurisdiction to determine the reasonableness of this charge. The complaint will be dismissed."

Again in *Fort Worth Stockyards Co. vs. Brown,* 161 S. W. (2d) 549, the Stockyards Company sought to enjoin defendants from using its land. Stockyards had constructed an alley or driveway leading south from a public street to its pens. Defendants bought livestock from drivers on their way to plaintiff's pens, resulting in traffic congestion and loss of revenue to plaintiff. Defendants contended that the alley or driveway was a public thoroughfare and had been constantly so used by the general public with the knowledge and consent of plaintiff

for more than thirty years. The injunction was denied and plaintiff appealed. The court held:

> (Page 553) "* * * They (defendants) were never more than permittees * * *. Granting to defendants all the rights they may have acquired as such permittees on the premises, the permission given by plaintiff, either expressed or implied, was subject to plaintiff's revocation at its option. * * * to create such a prescriptive right the public use must be exclusive of the private uses of the owner. * * * Use, with permission of the owner, will never ripen into prescription * * *."

The court further held plaintiff's acquiescence in defendant's use of its land would not preclude plaintiff from determining who may and who may not transact business on its premises, this being true even though plaintiff's business is of a public nature. Judgment for plaintiff.

U. S. and I. C. C. vs. Pennsylvania R. Co., 242 U. S. 208, the first syllabus of which reads as follows:

> "1. The Interstate Commerce Commission was given no power to order a carrier to provide and furnish to shippers tank cars for interstate shipments of petroleum products by the amendment of the Act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, Sec. 8563), to the Act of February 4, 1887 (24 Stat. at L. 379, chap. 104), Sec. 1, defining the term 'transportation' as including 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported,' and making it the duty of every carrier subject to the provisions of the Act 'to provide and furnish such transportation upon reasonable request therefor' although by Section 12 as amended by the Act of March 2, 1889 (25 Stat. at L. 858, chap. 382, Comp. Stat. 1913, Sec. 8576), the Commission was authorized and re-

quired to execute and enforce the provisions of the act, and by Section 13, as amended by the Act of June 18, 1910 (36 Stat. at L. 550, chap. 309, Comp. Stat. 1913, Section 8581), was given power to enter orders not only regarding rates, but regarding classifications, regulations, or practices, whether affecting rates or not. If any duty to furnish such cars exists, it is enforceable in the courts, not by the Commission."

ELKINS ACT.

With respect to the Commission's view that the Stock Yards Company comes within Sec. 2 of the Elkins Act (49 U. S. C. A. 42): The only ground on which the Commission might make an order against said Company is in a situation where it may be included as a party, in addition to a carrier, so far as "rate, regulation or practice under consideration" are concerned. Even if we should concede, which we do not, that the Commission may control the rate, regulation or practice of non-carriers, the Commission clearly has no power to control the use of the privately owned land and tracks of the Stock Yards Company. By attempting to control the use of such property the Commission has ordered an appropriation thereof to the use and benefit of Swift & Company, authority for which assumption of power is not found in the Elkins Act or any other section of the Interstate Commerce Act. In fact such order effecting the appropriation of property without compensation, is a taking without due process and is unconstitutional.

In this connection attention is called to Conclusion of Law IV of the statutory three-judge District Court which clearly sets forth that any order that the Commission may have the power to enter under the Elkins Act must be a lawful order. That the order is unlawful is premised upon the firm belief of the lack of jurisdiction of the Commission over the Stock Yards Company, supported by the Interstate Commerce Act, and decisions thereunder, Sec. 1 of which act is as follows:

"Section 1. Regulation in general; car service; alteration of line. (1) Carriers subject to regulation.—The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or * * *."

The terms, "common carrier" and "railroad," are defined in Section 1 (3) of the Interstate Commerce Act, as follows:

"(3) Definitions.—The term 'common carrier' as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.' The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property."

Certain companies are named as common carriers, but it will be observed that a stock yard company is not specified.

In the case of *Pennsylvania R. Co. v. Public Utilities Com. of Ohio*, 298 U. S. 170, 80 Law. Ed. 1130, the Supreme Court of the United States has stated on page 171 of the former and page 1132 of the latter, that the Interstate Commerce Act is aimed at common carriers. We quote as follows:

"Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. The Interstate Commission Act (U. S. C. A. title 49, Sections 1 *et seq.*) is aimed at common carriers exclusively (Sec 1 (1), (3)), and not even at all these. With exceptions plainly unrelated to this case (Sec. 1 (1), (b), (c)), carriers, even though common, are unaffected by the act unless they are carriers wholly by railroad, or if partly by railroad and partly by water, are operated under 'a common control, management, or arrangement for a continuous carriage or shipment.' Sec. 1 (1) (a). Cf. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 16 S. Ct. 700, 5 Inters. Com. Rep. 391; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 S. Ct. 209; *Standard Oil Co. v. United States* (C. C. A. 2d) 179 F. 614; *Mutual Transit Co. v. United States* (C. C. A. 2d) 178 F. 664. There are limitations, moreover, in respect of the conduct to be controlled in addition to the foregoing limitations in respect of the carriers to be regulated. Even though the activities are those of common carriers by rail, the statute does not apply 'to the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any place in the United States.'" (pp. 174, 175)

Under the plain terms of Sections 1 (1) and 1 (3) The Cleveland Union Stock Yards Company is not subject to regulation by the Interstate Commerce Commission. The above opinion of the Supreme Court clearly confirms this interpretation of those sections.

The Commission entertains some theory that Section 42, title 49 U. S. C., authorizes the decision and the order pursuant thereto, against The Cleveland Union Stock Yards

Company. In this, the Commission has misinterpreted the intendment of that section. Congress never intended that the Commission, under and by virtue of Section 42, could regulate all non-carriers who may be interested in matters before the Commission. However, in the instant case the Commission plainly attempts to regulate The Cleveland Union Stock Yards Company, which Company was a defendant in the proceedings. An order was issued against all defendants, which necessarily included that one. It, with the others, is ordered to cease and desist from refusing to deliver livestock to the plant of Swift & Company. It, with the others, is also ordered to publish and maintain a schedule of charges for such deliveries. Compliance by this plaintiff, in view of the fact that it does not operate a railroad company, is not a common carrier, and has no rolling stock; would be exceedingly difficult; in fact, it would be impossible.

A further reference to show the Commission's lack of jurisdiction over a non-carrier will be found in the case of *Refrigerator Car Mileage Allowances*, 232 I. C. C. p. 276, particularly pages 278-9.

So far as concern the "rate, regulation or practice under consideration," referred to in Sec. 2 of the Elkins Act, see the case of *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 428-9, where it is said:

> "Freight cars are facilities of transportation, as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper, and therefore have the exclusive right to furnish them. They are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Commission. If the carriers pay too much

for the hire of such cars the Commission may, of course, refuse to allow them to reflect such excess cost in their tariffs. The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore its practices lie *without* the realm of the Commission's competence."

See also *Ellis v. I. C. C.*, 237 U. S. 434, at pp. 443-4 where the Court says:

"The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, tank and box cars, and that lets these cars to the railroad or to shippers. It also owns and operates icing stations on various lines of railway, and from these ices and re-ices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of th cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in Section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc. is to be effected by its control over the railroads that are subject to the act."

CONCLUSION.

The controversy is resolved into the two principal questions with respect to the power and authority of the Commission to order the railroad companies to commit a trespass upon the land of the Stock Yards Company, upon

the one hand, and to order the appropriation of said Stock Yards Company's land for the use and benefit of its competitor, Swift & Company, on the other hand. The further questions involved concern the application of the provisions of the Interstate Commerce Act under which the Commission attempts to justify its assumption of jurisdiction and issuance of the orders here involved; however such orders are clearly not within its powers under that Act or the constitution. The appellees respectfully submit that such orders are beyond the lawful authority of the Commission and are wholly illegal and void as was determined by the findings and judgment of the statutory three-judge district court which should be affirmed without further argument, or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that I served the foregoing Motion to Affirm and Brief in Support of Motion by this day mailing a copy thereof to all counsel for appellants in this case.

Dated August 9, 1947.

ROBERT R. PIERCE,
Counsel for Appellees.

APPENDIX.

Title 49 U. S. Code—

Sec. 1(3)(a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

Sec. 1(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or con-

nected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Sec. 1(9) Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Sec. 3(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, asso-

ciation, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 42. *Parties included in proceedings to enforce law.* In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers. (Feb. 19, 1903, c. 708, Sec. 2, 32 Stat. 848; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 223.

UNITED STATES OF AMERICA, *et al.*,
Appellants,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellees.

ON APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR THE RAILROADS.

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INDEX.

Opinions Below 1

Jurisdiction 1

Statute Involved 2

Question Presented 2

Statement 2

Summary of Argument 6

Argument 9

I. The Railroads Cannot be Compelled to Construct a Track to Swift's Private Side Track 10

II. The Commission Cannot Compel the Railroads to Use the Stock Yards' Private Side Track 13

A. The Commission Has No Power to Require That the Stock Yards' Private Side Track Be Devoted to Public Use for the Delivery of Live Stock Unless By Act of the Stock Yards the Side Track Has Been So Devoted 13

B. The Stock Yards Has Not Devoted Its Side Track to Public Use for the Delivery of Livestock 16

C. Section 2 of the Elkins Act Does Not Enlarge the Constitutional or Statutory Authority of the Commission 22

III. The Commission Failed to Make Basic or Essential Findings Required by the Act to Support its Order, Failed to Dispose of Issues Presented, and Made an Order Which is Wholly Inadequate 23

A. The Commission Failed to Make the Basic or Essential Findings Required by the Act to Support its Order 23

B. The Commission Failed to Dispose of the Issues Presented and Made an Inadequate Order 26

Conclusion 27

APPENDIX:

Interstate Commerce Act, as Amended (49 U. S. C. 1 *et seq.*) 29

Section 2, Elkins Act (49 U. S. C. 42) 31

AUTHORITIES CITED.

Cases.

Alabama, etc. Railway Co. v. Herring, 234 Ala., 238... 21

Alabama Central Railroad Co. v. Public Service Commission, 200 Ala. 536. 12

Baltimore etc. Live Stock Co. v. P. B. & W. Railroad Co., 20 I. C. C. 124 18

Barlotti v. Public Utilities Commission, 103 Oh. St. 647 18

Campbell v. Storage and Van Co., 187 Mo. App. 565...20-21

Certain-Teed Products Corporation v. Chicago, etc. Railway Company, 68 I. C. C. 260 11

Chicago, etc. Railway Co. v. Wallace, 66 Fed. 506..... 20

Cleveland, C., C. & St. L. Ry. Co. v. United States, 275 U. S. 404 .....11, 12

Coe v. The Columbus, Piqua and Indiana Railroad Co., 10 Oh. St. 372 18

Collier v. Langan, etc. Moving Co., 147 Mo. App., 435.. 21

Collins v. Craig Shipbuilding Co., 7 C. C. N. S. (Ohio) 350 21

Craig v. Public Utilities Commission, 115 Oh. St. 512... 21

Florida v. United States, 282 U. S. 194..... 24

Goodin v. Cincinnati and Whitewater Canal Co., 18 Oh. St. 169 18

Kuter v. Michigan Central Railway Co., 14 Fed. Cas. 884 20

Limits Industrial Building Corp. v. Baltimore, etc. Railroad Company, 258 I. C. C. 438 12

Louisville, etc. Railway Co. v. Higdon, 149 Ky. 321 20

Louisville, etc. Railroad Co. v. Mottley, 219 U. S. 467 .. 25

Louisville, etc. Railroad Co. v. West Coast Naval Stores Co., 198 U. S. 483 14

Morgan Run Railway Co. v. Public Utilities Commission, 98 Oh. St. 218 18

Mueller v. Cincinnati Traction Co., 19 Oh. Dec. 504 17

Northern Pacific Railroad Co. v. Smith, 171 U. S. 260 ..... 17, 18

Pennsylvania Co. v. Platt, 47 Oh. St. 366 18

Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177 27

Producers Transportation Co. v. Railroad Commission, 251 U. S. 228 14

Roberts v. Northern Pacific Railroad Co., 158 U. S. 1 ..... 17, 18

Rodefer v. Pittsburgh, etc. Railroad Co., 72 Oh. St. 272 ..... 17, 19

Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80 27

Sholl Bros. v. Peoria, etc. Railway Co., 276 Ill. 267 ... 12

State v. Rosenstein, 217 Iowa, 985 ..... 14, 20

Toledo v. Public Utilities Commission, 135 Oh. St. 57 ..... 17, 19-20

United States v. Carolina Freight Carriers Corp., 315 U. S. 475 ..... 20, 26

United States v. Chicago etc. Railroad Co., 294 U. S. 499 ..... 24, 26, 27

United States v. Idaho, 298 U. S. 105 16

Yeager v. Tuning, 79 Oh. St. 121 17

Text.

Michie, Carriers, Volume 1, Section 362..... 21

Statutes.

Elkins Act (49 U. S. C. 42):
Section 2 .....3, 7, 14, 22, 31
Interstate Commerce Act, as Amended (49 U. S. C. 1 *et seq.*) 1
Section 1(3)(a) 7, 8, 15, 16, 22, 29
Section 1(6) 6, 7, 8, 11, 12, 15, 22, 23, 24, 29
Section 1(9) 6, 7, 8, 9, 11, 12, 15, 22, 23, 24, 29
Section 1(21) 10
Section 1(22) 10
Section 3(1) 6, 7, 8, 11, 12, 15, 22, 23, 24, 30
Section 15 15
Judicial Code, as amended (28 U. S. C. 47a, 345):
Section 210 1
Section 233 1

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 223.

UNITED STATES OF AMERICA, *et al.*,
Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellees.

ON APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR THE RAILROADS.

OPINIONS BELOW.

The report of the Interstate Commerce Commission (R. 28-50) is reported in 266 I. C. C. 55. The opinion of the District Court (R. 148-152) is reported in 71 F. Supp. 499.

JURISDICTION.

The final judgment of the three-judge district court (R. 190-191) was entered on May 14, 1947. The petition for appeal was presented and allowed on July 11, 1947 (R. 191-192). Jurisdiction of this Court is invoked under Sections 210 and 238 of the Judicial Code, as amended. 28 U. S. C. 47a, 345. Probable jurisdiction was noted on October 13, 1947 (R. 619).

STATUTE INVOLVED.

Relevant provisions of the Interstate Commerce Act (49 U. S. C. 1, *et seq.*) are copied in the Appendix.

QUESTION PRESENTED.

Whether the Interstate Commerce Commission has constitutional and statutory authority by order to require a railroad to make deliveries of carload shipments of livestock to a shipper on the shipper's private side track where compliance with that order will require the railroad either (1) to acquire a right of way and construct a track from its line of railroad to the shipper's private side track or, (2) to use a side track owned by another shipper whose contract with the railroad precludes use of that shipper's side track for the purpose of making such deliveries.

STATEMENT.

This case grows out of an attempt by Swift[1] to obtain delivery of livestock direct to its private side track from New York Central's main line (and hence the lines of the other Railroads) in one of two ways: by forcing the Stock Yards to make its intervening private side track available; or by compelling the New York Central either to exercise a right, which it did not possess, to use the Stock Yards' private side track, or to build a track from its

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[1] For convenience the following abbreviations have been used in this brief: Swift refers to Swift and Company and any predecessors in interest. New York Central refers to The New York Central Railroad Company and any predecessors in interest. Railroads refer to The New York Central Railroad Company, The Pennsylvania Railroad Company, The Erie Railroad Company, The Wheeling and Lake Erie Railroad Company, and The Baltimore and Ohio Railroad Company. Stock Yards refers to The Cleveland Union Stock Yards Company. Commission refers to the Interstate Commerce Commission. Act refers to the Interstate Commerce Act. The New York, Chicago and St. Louis Railroad Company was a defendant before the Interstate Commerce Commission but was not a party to the suit in the District Court.

main line and acquire right of way therefor in order to connect with Swift's private side track. To achieve that result, Swift complained to the Commission, making the Railroads defendants by virtue of their status as common carriers and the Stock Yards by virtue of the supposed authority of Section 2 of the Elkins Act (49 U. S. C. 42). The Commission did not make any findings concerning the status of the Stock Yards, the nature of its business or the services it rendered. The Commission assumed jurisdiction of the Stock Yards and made an order against it on the sole ground that Section 2 of the Elkins Act authorized the Commission's action (R. 29). For the purposes of this case, therefore, the Stock Yards has no status different from the status of any private industry.

The statement of facts in the appellants' brief is correct as far as it goes. But it wholly fails to set forth additional facts which were found by the Commission. The full facts eloquently present the background and nature of this controversy and one of the reasons why three members of the Commission dissented from the Commission's report which was contrary to the examiners' recommendations. R. 28, 45, 49. To place these additional facts in their proper setting, some repetition is necessary.

Track 1619 was constructed in 1899, wholly on the land of the Stock Yards and at its expense, pursuant to a convential private side track agreement which gave New York Central the right to use the track so long as the use did not interfere with the business of the Stock Yards. R. 30, 347. Ownership of the track was expressly vested in the Stock Yards. R. 348. The agreement was terminable by the New York Central on sixty days' notice. R. 30, 349.

In 1924, a new private side track agreement was executed by the Stock Yards and the New York Central. This agreement confirmed the Stock Yards' ownership of the track, gave the New York Central the right to use it, and provided for maintenance by the New York Central. R. 30,

340-341. This agreement was terminable by either party on thirty days' notice. R. 30, 341. In December, 1934, the Stock Yards exercised its option to terminate the 1924 agreement. R. 423-424. Thereafter, the Stock Yards demanded that the 1924 private side track agreement be amended so as to deny New York Central the right to use the Stock Yards' private side track for competitive traffic, a charge for which use was to be the subject of a separate agreement. R. 31, 339. The parties construed "competitive traffic" to mean livestock. R. 31.

Prior to 1910, Swift did not have access to New York Central's main line. In 1907, Swift and other nearby industries sought to obtain their own direct connection with New York Central's main line by a spur running directly to their property. R. 31. Swift obtained the necessary municipal ordinance and induced New York Central to condemn the right of way to make construction of the spur possible. R. 31, 344. Swift then determined that the cost of the track and land would be greater than it was willing to bear and abandoned the plan. R. 31, 344-345. If Swift had consummated its plan there would have been no occasion to use the Stock Yards' private side track. R. 31.

In 1910, with full knowledge of the Stock Yards' ownership and control of its private side track, Swift apparently concluded to take advantage of the Stock Yards' private side track and commenced negotiations to that end. R. 31, 184. At the request of Swift, the New York Central agreed to build the track required to connect the Stock Yards' private side track with Swift's proposed private side track, if Swift obtained the necessary right of way. R. 345. Swift procured the requisite municipal ordinance granting a permit to construct a side track at grade across a city street (which permit may be cancelled at will by the city), obtained easements for the right of way, including a small parcel of land owned by the Stock Yards, and caused the easements to be conveyed to New York Central. R. 31,

345. The additional tracks were then built and connection was made to the Stock Yards' private side track. Conventional private side track agreements were executed from time to time by Swift and the New York Central covering Swift's private side track and subsequent extensions. R. 32. Each agreement permitted use by New York Central which did not interfere with Swift's business. Each agreement was terminable by either party on thirty or sixty days' notice. R. 32.

From 1916 to 1936, Swift owned 6.5 per cent of the outstanding shares of stock of the Stock Yards, and its Cleveland plant managers served on the Board of Directors of the Stock Yards. R. 34, 442. During part of this time, representatives of the Stock Yards and Swift served on a traffic and transportation committee for the Stock Yards district. R. 34. In 1936, Swift divested itself of ownership in the Stock Yards pursuant to a court order rendered in 1931. R. 34.

From 1910 to 1930, Swift accepted delivery of livestock at the Stock Yards. R. 34. It sought to have deliveries made direct to its side track only after the Stock Yards proposed to make charges for services which the Stock Yards had theretofore rendered without charge. R. 34. This was about the same time that Swift had been ordered by the court to divest itself of ownership in the Stock Yards. Swift has only limited, actually inadequate, facilities for unloading carload shipments of livestock. R. 32. Since 1935, when the Stock Yards withheld use by the Railroads of its private side track for deliveries of livestock, the Railroads have not delivered livestock to Swift's side track but have made delivery at the Stock Yards. R. 32-33.

The Commission determined that the Railroads had subjected Swift to undue prejudice, had been guilty of an unreasonable practice, and had failed to operate a switch connection, all in violation of the Interstate Commerce Act.

49 U. S. C. 1(6), 1(9), 3(1). Its order, addressed to the Railroads and the Stock Yards, directed them to refrain from refusing to deliver livestock to Swift's private side track and to prepare and maintain schedules providing for such deliveries. R. 65-66. It was enforcement of this order which the District Court enjoined. R. 190.

SUMMARY OF ARGUMENT.

The inescapable effect of the Commission's order requiring the Railroads to make deliveries of livestock to Swift's private side track is to compel the Railroads to do one of two things: (1) to acquire a right of way and construct a track from the main line of the New York Central to Swift's private side track; or (2) to compel them to use the private side track of the Stock Yards. The Commission is without constitutional or statutory authority to require the Railroads to do either one of these things.

I. The Railroads cannot be compelled to construct a track to Swift's private side track. The provisions of the Interstate Commerce Act do not confer any authority upon the Commission directly or indirectly to compel a railroad to acquire a right of way and construct a track from its main line to reach a private industry. The decisions of this Court and of the Commission establish that a shipper desiring access to the main line of a railroad has the duty of acquiring a right of way and building a side track to the property line of the railroad's right of way. The performance of this duty is a condition precedent to any obligation on the part of the railroad to provide a connection to its main line.

II. The Commission cannot compel the Railroads to use the Stock Yards' private side track. The Commission intended and its order requires, in effect, that the Railroads make deliveries of livestock to Swift over the Stock Yards' private side track.

A. But the Commission has no power to compel the Stock Yards' private side track to be devoted to public use for the delivery of livestock unless by act of the Stock Yards the side track has been so devoted. The Stock Yards must be treated as a private industry and its side track must be regarded as the side track of a private industry. The Commission has no constitutional or statutory authority to compel a private industry against its will to permit use by a railroad of its private property. Nothing in Sections 1(3)(a), 1(6), 1(9) or 3(1) of the Act purports to give the Commission any such authority, and the Constitution forbids it. Hence, the Commission was without power to require the Stock Yards to devote its private side track to public use for the delivery of livestock by the Railroads unless the Stock Yards had by its own act devoted its side track to such use or was estopped to deny that it had done so.

B. The Stocks Yards has not devoted its side track to public use for the delivery of livestock. During the entire existence of the side track, the Stock Yards has at all times retained ownership and control of the side track, and has permitted use of the side track only pursuant to revocable side track agreements with the New York Central. Even if the side track had been devoted to unrestricted public use prior to 1935, the Stock Yards was free thereafter to withhold all use of the side track or to withhold its use for the delivery of livestock. A common carrier may hold itself out to the public as being a carrier of specified articles only. The right of a private industry to limit the extent to which its private property is devoted to public use cannot be less than the right of a common carrier to limit the extent to which it serves the public.

C. Section 2 of the Elkins Act does not enlarge the constitutional or statutory authority of the Commission. This section carries its own refutation of any contention that it was intended to enlarge the definition of "railroad"

in Section 1(3)(a), the prohibitions of Section 1(6) and 3(1), or the duties imposed on the Railroads by Section 1(9) of the Interstate Commerce Act.

III. The Commission failed to make basic or essential findings required by the Act to support its order. Moreover, it failed to dispose of important issues presented to it in the course of its proceeding, and rendered an order which is wholly inadequate. Essentially this case involves a controversy between Swift and the Stock Yards which the Commission attempted to adjudicate by directing an order against the Railroads. Confronted with the private side track agreement between the Stock Yards and the New York Central, the Commission improvised a basis of jurisdiction and on that basis rested its conclusion that the Railroads had been guilty of undue prejudice, an unreasonable practice, and failure to operate a switch connection in violation of Sections 3(1), 1(6) and 1(9) of the Act.

A. The Commission failed to make the basic or essential findings required by the Act to support its order. To establish violations of these sections, the Commission was required to do more than merely express its findings in the words of the Act. Before the Commission could find that failure of the Railroads to deliver livestock to Swift's private side track over the side track of the Stock Yards constituted an *unreasonable* practice, an *undue* prejudice to Swift or an *undue* preference to Swift's competitors, and before the Commission could find that the Railroads could operate the switch connection upon *reasonable* terms and that such operation would provide the Railroads *reasonable* compensation, the Commission was required to find the cost to the Railroads of making such deliveries. In failing to make this finding, the Commission omitted to find the quasi-jurisdictional facts necessary to sustain its order.

B. The Commission failed to dispose of important issues presented in the course of the proceeding and rendered a wholly inadequate order. The Commission failed

to decide a number of vital questions, including the question whether or not the Stock Yards are free to terminate the side track agreement and prevent the Railroads from complying with the Commission's order, and the question whether or not the Railroads must pay for use of the Stock Yards' private side track and if so, upon what basis. The Commission has, therefore, made a report and order which provide a formula for confusion.

ARGUMENT.

The correctness of the judgment of the District Court depends upon the validity of the Commission's order. The validity of that order depends, in turn, upon the authority of the Commission to make it. If the Commission's order exceeded its constitutional or statutory authority, then the District Court was correct in enjoining enforcement of the order and its judgment must be affirmed.

The Railroads have consistently expressed their willingness to deliver livestock to Swift's private side track if Swift will make satisfactory arrangements with the Stock Yards for the use by the New York Central of Track 1619, or if Swift will conform to Section 1(9) of the Interstate Commerce Act and construct its private side track to the New York Central's main line. The Railroads would be entirely willing to make such deliveries to Swift as required by the Commission's order if the order were within the Commission's constitutional and statutory authority, and constituted a complete disposition of the proceeding before the Commission. But the Railroads are unable to find the requisite authority for the Commission's order and therefore have no alternative but to resist it because of the dilemma facing them: either possible heavy penalties as a result of violation of the order, or possible liability under State law as a result of invasion of private property rights in compliance with the order.

The manner in which the Commission exceeded its authority can be more clearly grasped from an analysis of

precisely what it ordered and what that order involves. In effect, the Commission has ordered the Railroads to make deliveries of livestock directly to Swift's private siding. This the Railroads can do in only one of two ways: by construction of a track from the New York Central's main line to Swift's private siding; or by making the deliveries over Track 1619, which is not owned by New York Central and over which it has only limited rights. The Railroads will show in succeeding pages that the Commission was without authority directly or indirectly to require the Railroads to do either one of these things, either one of which would compel the Railroads to confer upon Swift an undue preference and advantage as compared to other shippers.

I. THE RAILROADS CANNOT BE COMPELLED TO CONSTRUCT A TRACK TO SWIFT'S PRIVATE SIDE TRACK.

The Commission's order cannot be sustained on the ground that the Railroads can comply with it by resorting to the first alternative, construction of a track from the New York Central's right of way to Swift's private sidetrack. Viewed in this light, the order would clearly exceed the Commission's statutory authority and, in fact, would be in direct conflict with the plain provisions of the Interstate Commerce Act and decisions construing it. Section 1(21) of the Act confers limited authority upon the Commission to require a railroad to provide adequate facilities or to extend its lines, but only after the Commission has made findings which it did not make in this case. Section 1(22) of the Act expressly provides that the authority conferred by Section 1(21) "shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State * * *" 49 U. S. C. 1(22).

Section 1(9) of the Act is equally explicit in the authority which it gives to the Commission and the duties

which it imposes on a railroad.[2] Thus it provides that any common carrier subject to the Act "upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad * * *" 49 U. S. C. 1(9). In the words of this Court, Section 1(9) "limited the railroad's obligation to the building of the switch connection, leaving the burden of building the side track upon the shipper * * * and the railroad cannot be ordered to build the switch until after the shipper has built the private siding." *Cleveland, etc. Railway Co. v. United States*, 275 U. S. 404, 413.

Nor can an order of the Commission which, in effect, requires the Railroads to build a track to Swift's side track be sustained merely because the Commission has authority to find and remedy alleged violations of Sections 1(6), 1(9) or 3(1) of the Act. Violations of the Act are not to be found and remedied in a vacuum or in the abstract. The Commission's authority to determine complaints and issue orders is measured by the statute which is its sole authority to act at all. The Commission has no authority directly to order the Railroads to acquire a right of way and construct a track to Swift's private side track. Indirect authority to require the same thing cannot be drawn from the authority

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[2] "There is no duty on the part of a common carrier subject to the act to provide tracks off its lands to effect connection with an industry. If an industry desires connection with a trunk line, the duty devolves upon it to make arrangements for the procuring of a spur. Paragraph 9 of section 1 makes it the duty of a common carrier under stated circumstances to construct, maintain, and operate, upon reasonable terms, switch connections with private sidetracks which may be constructed to connect with its rails by shippers tendering interstate commerce. But this duty does not arise until the shipper has provided the sidetrack." *Certain-Teed Products Corporation v. Chicago, etc. Railway Company*, 68 I. C. C. 260, 263.

of the Commission to find and remedy alleged violations of Section 1(6), 1(9) or 3(1) of the Act in the conduct of operations over the *existing* tracks.[2]

For the same reasons, the Commission's order cannot be supported with the appellants' startling proposition that it was authorized because Swift's private side track was physically connected to the otherwise isolated 793 feet of track owned by the New York Central and lying between Swift's private side track and the private side track of the Stock Yards. This isolated piece of track, except as the Railroads have the right to reach it over the Stock Yards' private side track, is not a part of the New York Central's railroad, but is merely so much steel and so many ties. Hence, the appellants' proposition involves either the assumption that the Commission has authority to compel the Railroads to construct a track from the New York Central's main line to this 793 feet of rails and ties, or else the assumption that the Commission can require the Railroads to utilize the Stock Yards' private side track in reaching Swift's side track.

The first assumption is clearly untenable for the reasons just stated. The assumption that the Commission can require the Railroads to use the Stock Yards' private side track over which they have only limited rights is shown, in Part II of this brief, to be equally untenable.

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[2] "Section 1(9) does not authorize us to require a railroad to construct and operate a switch connection with a private sidetrack unless and until that track had been constructed, *Cleveland, C., C. & St. L. Ry. Co. v. United States*, 275 U. S. 404. It logically follows that a railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in fact available for use. Common-carrier services over private sidings and private industrial tracks cannot be expected, and certainly cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevents it from entering upon those tracks. Nor is it within our jurisdiction to order a carrier, or any other party, to take steps to remove such obstructions." *Limits Industrial Building Corp. v. Baltimore, etc. Railroad Company*, 258 I. C. C. 438, 441. See also: *Skoll Bros. v. Peoria, etc. Railway Co.*, 276 Ill. 267; *Alabama Central Railroad Co. v. Public Service Commission*, 200 Ala. 536.

It is therefore apparent that the Commission's order cannot be sustained on the ground that the Commission has authority directly or indirectly to compel the Railroads to construct a track from the New York Central's main line to Swift's private side track. In fact, nothing in the Commission's order or report indicates that the Commission thought it could base its order on that ground. It is quite clear from the report that the Commission expected the Railroads to use the Stock Yards' private side track in complying with the order, and that the Commission issued the order on the assumption it had authority to require just that. But this assumption, in the Railroads' view, presupposes the existence of authority which is not given to the Commission by the statute and is denied by the Constitution.

II. THE COMMISSION CANNOT COMPEL THE RAILROADS TO USE THE STOCK YARDS' PRIVATE SIDE TRACK.

In practical effect, the Commission's order compels the Railroads to deliver livestock to Swift over the Stock Yards' private side track. This it could require only on one of two assumptions: that the Commission has the power to compel a private "non carrier" industry to devote its privately owned side track to public use for the delivery of livestock; or that the Stock Yards has, by its own act, devoted its side track to public use for the delivery of stock. In the Railroads' view, both of these assumptions are untenable.

A. The Commission Has No Power To Require That The Stock Yards' Private Side Track Be Devoted To Public Use For The Delivery of Live Stock Unless By Act of The Stock Yards The Side Track Has Been So Devoted.

The Stock Yards was not brought before the Commission or included in the Commission's order as a common carrier. R. 29. Jurisdiction of the Stock Yards and authority of the Commission to make an order against it were

grounded solely on Section 2 of the Elkins Act, 49 U. S. C. 42. For the purpose of this case, therefore, the Stock Yards and its private side track must be regarded no differently than would be the case if all other facts were the same but the side track were owned by any private industry.

In these circumstances, an attempt by the Commission to compel the Stock Yards against its will to permit use by the Railroads of its private sidetrack would, as the Railroads have always considered, constitute a taking of private property without due process of law. The Railroads know of no Constitutional or statutory authority, and the appellants point to none, which would empower the Commission to *require* the Stock Yards to devote its private side track to public use. As this Court observed on another occasion: "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation; which no State can do consistently with the due process of law clause of the Fourteenth Amendment." *Producers Transportation Co. v. Railroad Commission*, 251 U. S. 228, 230-231; see also *Louisville, etc. Railroad Co. v. West Coast Naval Stores Co.*, 198 U. S. 483. Nor does the fact that the Stock Yards may have permitted the use of its private side track for the public transportation of limited categories of freight, whether by agreement between the Stock Yards and the New York Central or otherwise, invest the Commission with power to compel the use of this private track for the public transportation of other and additional categories of freight, e.g., livestock. See *State v. Rosenstein*, 217 Iowa, 985 and cases cited *infra*.

Sections 1(3)(a), 1(6), 1(9) and 3(1) of the Act do not purport to give the Commission any such authority. They would be unconstitutional to the extent that they did. Section 1(3)(a) merely provides, in part that the term railroad "shall include * * * all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein * * *." 49 U. S. C. 1(3)(a). The other sections, Sections 1(6), 1(9) and 3(1), merely impose prescribed duties on common carriers, the violation of which the Commission is empowered by Section 15 of the Act to remedy by appropriate order.

But nothing in the text of these sections or in their legislative history states or implies that in enacting them Congress intended to empower the Commission, directly or indirectly under the guise of regulating common carriers in the performance of their functions, to compel a private industry to devote its private property to a public use, or to compel that industry to permit unrestricted use of its property merely because by agreement it had permitted restricted use. In any event, these sections must be construed in the light of the limitations imposed by the due process clause of the Fifth Amendment to the Constitution.

In consequence, the Commission had neither constitutional nor statutory authority to compel the Stock Yards to permit use of its private side track by the Railroads, nor could it compel the Railroads to make deliveries of livestock to Swift over the Stock Yards' private side track, unless the Stock Yards had by its own act devoted its side track to a public use or was estopped to deny that it had done so. In view of the Constitutional and statutory limitations on the Commission's power, it must be assumed

that the Commission grounded its order against the Railroads on the supposition that the Stock Yards had by its own act devoted its side track to a public use for the delivery of livestock, or was estopped to deny that it had, and that the side track was therefore within the definition of "railroad" in Section 1(3)(a) of the Act.

B. The Stock Yards Has Not Devoted Its Side Track to Public Use for the Delivery of Livestock.

The District Court made the following findings[4] which are neither denied by the appellants nor controverted in the report of the Commission: that at all times the Stock Yards consistently, constantly, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track, subject to such temporary and limited right of use as it chose to grant; that every shipper serving or being served by the use of this track has had full knowledge of the Stock Yards' ownership and control of that track; that Swift and the other plants served in the past by the New York Central over the Stock Yards' side track were served with the consent of the Stock Yards; that no one has been led to act to his harm by any sufferance or acquiescence by the Stock Yards in the use permitted of its track; and that there is no evidence that the Stock Yards has ever acquiesced in any use of its side track by the Railroads or by Swift except under the provisions of a side track agreement. R. 184.

The District Court therefore concluded that "entrance upon the land of the Stock Yards and the use of its track

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[4] The importance of the District Court's findings with respect to the question whether or not the side track was part of the New York Central's "railroad" cannot be overemphasized. Compare *United States v. Idaho*, 298 U. S. 105, 109: "* * * whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

were not by sufferance, but, from beginning to the end, under the provisions of a written contract, expressly asserting ownership and reserving therein the property right of Stock Yards, limiting the character of shipments and made mutually terminable upon 30- and 60-day notice, respectively, all of which were well understood by Swift & Company, as well as by the Railroad." R. 184. Compare *Roberts v. Northern Pacific Railroad Co.*, 158 U. S. 1; *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260.

The Railroads had no rights to use the Stock Yards' private side track except the rights conferred on the New York Central by the side track agreement executed in 1935. In the absence of that agreement, the Railroads had no rights at all. If the facts be examined as they were in 1935 just after the Stock Yards exercised its option to terminate the side track agreement, the nature of the Railroads' rights then and now becomes more clearly apparent. After the notice of termination and prior to the new agreement, Swift was receiving deliveries of any commodity on borrowed time. In the absence of a new agreement, the Railroads' right to use the Stock Yards' side track would have ended and so would Swift's access to the New York Central's main line over that track. Under Ohio law, the *Stock Yards* could have terminated the agreement even in the absence of the termination clause and even though the interest of another shipper was involved. *Rodefer v. Pittsburgh, etc. Railroad Co.*, 72 Oh. St. 272; see also *Yeager v. Tuning*, 79 Oh. St. 121, *Mueller v. Cincinnati Traction Co.*, 19 Oh. Dec. 504. For that matter, the New York Central apparently could have abandoned it. *Toledo v. Public Utilities Commission*, 135 Oh. St. 57.

Then and now, the only right of use the Railroads could have was fixed by the terms of whatever side track agreement the New York Central could negotiate with the Stock Yards. To the extent that the Stock Yards permitted use of its private side track, the Railroads could,

of course, use it to make deliveries. It may be assumed that *within the limits of that use* the Railroads were obligated to comply with the duties imposed upon them by the Interstate Commerce Act, and could be compelled by the Commission, for example, to render nondiscriminatory service. Compare *Baltimore etc. Live Stock Co. v. P. B. & W. Railroad Co.*, 20 I. C. C. 124. But beyond that neither the Railroads nor the Commission was authorized to go.

It must be borne in mind that the Railroads did not and never had owned the Stock Yards' private side track or the land on which it was laid, had no ownership or interest in the Stock Yards, and throughout had dealt with the Stock Yards at arms' length. Compare *Morgan Run Railway Co. v. Public Utilities Commission*, 98 Oh. St. 218; *Barlotti v. Public Utilities Commission*, 103 Oh. St. 647. This case is therefore entirely different from a case where the owner of the private property has *not* specified the terms of the railroad's use of his property in a revocable agreement of which all parties in interest had notice. Compare *Roberts v. Northern Pacific Railroad Co.*, 158 U. S. 1; *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260; *Coe v. The Columbus, Piqua and Indiana Railroad Co.*, 10 Oh. St. 372, 411; *Goodin v. Cincinnati and Whitewater Canal Co.*, 18 Oh. St. 169; *Pennsylvania Co. v. Platt*, 47 Oh. St. 366, 385.

The Commission did not deny that the Stock Yards could exercise the power of termination which the Stock Yards reserved in the 1935 side track agreement. The appellants are content only to question the Stock Yards' right to do so. But both the Commission and the appellants seem to assume that at least as long as the Stock Yards makes its private side track available at all, the Commission is authorized to compel the Stock Yards to make it available for the delivery of livestock, notwithstanding the contrary provisions of the side track agreement. The

basis of this authority is said to be the "common carrier status" of the side track. The "common carrier status" of the side track is said to result from the limited devotion to public use which the Stock Yards permitted after 1935. The Commission did not state whether it thought that the devotion to public use for the delivery of livestock came about because the Stock Yards had somehow impliedly agreed to such use contrary to its express limitation, or because the Stock Yards was estopped to deny that the side track had been devoted to such use.

But the Commission's conclusion is fallacious, whether it proceeded on the theory of estoppel or implied agreement. Swift and the other plants served in the past had full knowledge of the Stock Yards' ownership and control of its side track. There is no evidence that the Stock Yards represented or held out to anyone that its private side-track was open to public use for the delivery of livestock or even to any use at all except on such terms as the Stock Yards chose to impose. The District Court expressly found that "there is no evidence that the Stock Yards has ever acquiesced in any use of its land or said side track by the Railroad or Swift & Company, except under the provisions of the side track agreement." R. 184. Certainly the Stock Yards cannot be said to be barred by any implied agreement, or estopped by any conduct on its part, from withdrawing all right to use the side track or from limiting its future use. How, then, has its side track been devoted to a public use for the delivery of livestock?

Even if it be assumed that until 1935 the Stock Yards had permitted unrestricted use of its side track and that the side track had therefore been devoted to unrestricted public use up to that time, it does not follow that the Stock Yards was powerless thereafter to limit use of the side track by declining to permit the delivery of livestock. The Railroads know of no authority (compare *Rodefer v. Pittsburgh, etc. Railroad Co.*, 72 Oh. St. 272; *Toledo v.*

Public Utilities Commission, 135 Oh. St. 57), and the appellants point to no authority which is not clearly distinguishable, which would deny the Stock Yards the right in 1935 to withhold all use of its private side track. For the purposes of this case and this question, the Stock Yards was no different than a private industry and as such was not required by statute to obtain the permission of anyone before it could grant or withhold public use of its property. When the Stock Yards withdrew permission to deliver livestock, it withdrew the permission as to everyone. There was no discrimination in the withdrawal.

In short, if there was devotion to public use it was by reason of and was measured by the side track agreements. Hence, even on the assumption that prior to 1935 the Stock Yards had permitted its side track to be devoted to a public use with respect to the delivery of all commodities, it does not follow that the Stock Yards had lost the right to withhold the devotion of its side track to public use for the delivery of livestock, by the 1935 side track agreement. "It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say, he may be a common carrier only of a restricted number of commodities." *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 483.

Even a common carrier is not required to make deliveries or render services beyond the scope of its holding out or representations to the public. "In order to be held liable as a common carrier, the goods in question must be such as he professes to carry. In other words, a common carrier may hold itself out to the public as being a carrier of specified articles only and if it is only engaged in the carriage of such articles it is under no obligation to carry other things." *State v. Rosenstein*, 217 Iowa, 985. See also, *Chicago, etc. Railway Co. v. Wallace*, 66 Fed. 506; *Kuter v. Michigan Central Railway Co.*, 14 Fed. Cas. 884; *Louisville, etc. Railway Co. v. Higdon*, 149 Ky. 321; *Camp-*

bell v. Storage and Van Co., 187 Mo. App. 565; *Alabama, etc. Railway Co. v. Herring*, 234 Ala., 238; *Collier v. Langan, etc. Moving Co.*, 147 Mo. App., 435; *Craig v. Public Utilities Commission*, 115 Oh. St. 512; *Collins v. Craig Shipbuilding Co.*, 7 C. C. N. S. (Ohio) 350; Michie, *Carriers*, Volume 1, Section 362.

The right of a private industry to limit the extent to which its private property is devoted to a public use cannot be less than the right of a common carrier to limit the extent to which it serves the public. It is therefore not a matter of all or none as the appellants suggest. So long as the Stock Yards does not represent or hold out that its private side track can be used for the delivery of livestock, its private side track, to that extent, has not been devoted to a public purpose with a resulting "common carrier status." And this is so, even on the erroneous assumption that to the extent of the use the Stock Yards permitted for other purposes its side track may have been devoted to a public use and therefore acquired a "common carrier status."

One of the fallacies inherent in the Commission's conclusion and order is strikingly apparent in the facts of this case. The Commission's order makes no provision for the event that the Stock Yards may terminate the side track agreement. In that event, the Railroads would be left in an impossible position. Confronted with the alternative of using the Stock Yards' private side track, which by hypothesis is impossible, or of acquiring a right of way (whether by agreement, purchase or condemnation) from the New York Central's main line to Swift's private side track, which the Commission had no authority to require, the Railroads must risk heavy penalties for violation of the Commission's order, or liability to the Stock Yards for invasion of private property rights in compliance with the order.

C. Section 2 of The Elkins Act Does Not Enlarge The Constitutional or Statutory Authority of the Commission.

So far as relevant here, Section 2 of the Elkins Act provides in effect that in any proceeding before the Commission for the enforcement of the provisions of the Interstate Commerce Act "it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." 49 U. S. C. 42.

It is not clear from the report of the Commission precisely what authority it believed that this section gave it with respect to its order against the Railroads or the effect, as to the Stock Yards, of its conclusion about the "common carrier status" of the Stock Yards' private side track. Thus, it is not clear whether the Commission believed it would have had the authority to make the order it did in the absence of Section 2 of the Elkins Act and the presence of the Stock Yards in the proceeding before the Commission. It *is* clear that Section 2 of the Elkins Act did not enlarge the definition of "railroad" in Section 1(3)(a), the prohibitions of Sections 1(6) and 3(1), or the duties imposed on the Railroads by Section 1(9) of the Interstate Commerce Act.

Section 2 carries its own refutation of any contention to the contrary in the provision granting the Commission authority only "to the same extent, and subject to the same provisions, as are or shall be authorized by law with respect to carriers." There is no basis in the legislative history or in the decisions cited by the appellants for supposing that Congress intended Section 2 of the Elkins Act to be a charter of authority to the Commission beyond the powers

given to it by other statutes relating to interstate commerce or in contravention of the Constitution.

III. THE COMMISSION FAILED TO MAKE BASIC OR ESSENTIAL FINDINGS REQUIRED BY THE ACT TO SUPPORT ITS ORDER, FAILED TO DISPOSE OF ISSUES PRESENTED, AND MADE AN ORDER WHICH IS WHOLLY INADEQUATE.

The fundamental difficulty in this entire proceeding stems from the Commission's attempt to adjudicate what is essentially a controversy between Swift and the Stock Yards and dispose of that controversy by an order against the Railroads. In that process, the Commission was brought face to face with the private side track agreement between the Stock Yards and the New York Central. The Commission sought to avoid its effect by determining that the side track had been devoted to a public use, had a "common carrier status," and was therefore a part of the New York Central's "railroad." Having thus improvised a basis for its jurisdiction, the Commission then determined that in not delivering livestock to Swift, the Railroads had been guilty of undue prejudice (Section 3(1)), an unreasonable practice (Section 1(6)), and failure to operate a switch connection (Section 1(9)). This, in short compass, was the foundation on which the Commission rested its order requiring the Railroads to deliver livestock to Swift over the private side track of the Stock Yards.

A. The Commission Failed to Make the Basic or Essential Findings Required by the Act to Support its Order.

To hold that the Railroads have been guilty of an "unreasonable practice," "undue prejudice and preference," and "failure to operate a switch connection" is merely to say in the words of the Act that the Railroads have violated Sections 1(6), 3(1) and 1(9). In the words of this Court, "such a conclusion would not only require evidence to support it but findings of appropriate definiteness to ex-

press it." *Florida v. United States*, 282 U. S. 194, 208. This Court has held "that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. * * * In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." *United States v. Chicago etc. Railroad Co.*, 294 U. S. 499, 504-505.

To find that the Railroads had violated Sections 1(6) and 3(1) of the Act, the Commission was required by those sections first to find the basic underlying facts requisite to disclose that failure to deliver livestock to Swift's private side track over the private side track of the Stock Yards constituted an "*unreasonable* practice," an "*undue* prejudice" to Swift, and an "*undue* preference" to Swift's competitors. So also with respect to the violation of Section 1(9) of the Act, the Commission was required to find, among other things, the basic underlying facts necessary to disclose that operation of the switch connection would provide the New York Central "*reasonable* compensation" and that the switch connection could be operated upon "*reasonable* terms." Merely to state the conclusion is not to establish the fact.

In failing to find that cost to the Railroads of making deliveries of livestock to Swift over the Stock Yards' private side tracks, the Commission wholly omitted to find the quasi-jurisdictional facts required by the Act to sustain its findings of violations of Sections 1(6), 1(9) and 3(1). Without a finding as to whether or not the Railroads were obliged to pay the Stock Yards for the privilege of making deliveries of livestock over its private side track, the Commission could not possibly determine the cost to the Railroads of making such deliveries. Without a finding as to the cost to the Railroads of making such deliveries, the Commission could not possibly determine whether or not

the Railroads' failure to make such deliveries constituted an *unreasonable* practice, an *undue* prejudice to Swift, or an *undue* preference to Swift's competitors. Nor could the Commission find that the Railroads could operate the switch connection upon *reasonable* terms and that operation of the switch connection would insure *reasonable* compensation to the Railroads. The only evidence relating to the cost of using the private side track was to the effect that the Stock Yards would permit such use upon the payment to it of six to nine dollars per car. But the Commission did not find as a fact that this charge of six to nine dollars per car, or any other figure, constituted or would constitute the cost to the Railroads of delivering livestock to Swift, or that such delivery could be effected without cost.

The failure of the Commission to make the requisite finding on this aspect of the case was not inadvertent nor is it difficult to understand. Confronted with the private side track agreement between the Stock Yards and the New York Central, the Commission was unable to extricate itself from the following dilemma. Admitting for the sake of the argument, that the side track may have become a part of the New York Central's "railroad" and that the Railroads had the right to deliver livestock over it, what were the terms and conditions of the right? The Commission could not find as a fact that such deliveries could be made without compensation to the Stock Yards. This would have been in direct violation of the contract.[5] The Commission could

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[5] As the Railroads have shown earlier in this brief, the private side track agreement was the sole measure of the New York Central's right to use the side track. Nothing in the Act prohibited the Stock Yards (a private industry for the purposes of this case) from declining to grant any rights at all, or authorized the Commission to compel the Stock Yards, in 1899, in 1924, in 1935, or now, to grant more rights than it chose. This is therefore a problem totally different from the problem which would be presented if Congress had constitutionally empowered the Commission to fix the terms upon which a private industry must permit a railroad to use its property. Compare *Louisville, etc. Railroad Co., v. Mottley*, 219 U. S. 467.

not find that the compensation was to be measured by the demands of the Stock Yards because the Railroads had not agreed to such demands. The Commission has no power to order an appropriation of private property, and it carefully refrained from proceeding against the Stock Yards as a carrier. In consequence, the Commission was devoid of power to establish any compensation. Faced with this situation, the Commission made no finding of fact but contented itself with the expression of two conflicting opinions: "that the Stock Yards could not lawfully collect, or the Railroad pay, either yardage charges *or any other amount of special compensation* * * *," but that "the Stock Yards is, of course, entitled to reasonable compensation for the use of its track." (R. 40.)

The failure of the Commission to make the vital finding concerning the cost to the Railroads of providing the service required by the Commission's order constitutes a fatal defect with respect to each of the violations of the Act which the Commission purported to find. "* * * the defect is not merely one of the absence of a 'suitably complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order.'" *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 489. In the end, "we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency." *United States v. Chicago, etc. Railroad Co.*, 294 U. S. 499, 511.

B. The Commission Failed to Dispose of the Issues Presented and Made an Inadequate Order.

It is apparent from the foregoing analysis that the Commission's report and order provide a formula for confusion. The Commission either explicitly or implicitly left open the following questions: Can the Stock Yards terminate the side track agreement and thereby prevent the Railroads from complying with the order? If the Railroads

deliver livestock to Swift over the Stock Yards' side track, upon what terms must the Stock Yards make it available? Is the Stock Yards entitled to compensation for use of its side track? If so, from whom and upon what basis? If the Railroads must pay for use of the side track, must they absorb the charges or can they pass them on to Swift?

Assuming for the argument that the Commission was authorized in this case to make an order, the administrative process is no more vindicated by the Commission's failure to frame an order adequate to dispose of the case than by a lack of clarity in its exercise. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 197; compare *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80. Only by explicitly determining the questions left open and making an order appropriate to dispose of them could the Commission have avoided needless litigation, and insured that the object of the order, direct delivery of livestock to Swift's side track, could be promptly and fully achieved.

As this Court concisely stated on another occasion: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, etc. Railroad Co.*, 294 U. S. 499, 511.

CONCLUSION.

The Commission attempted to adjudicate a controversy between Swift and the Stock Yards by an order directed against the Railroads. In effect that order required the Railroads to deliver livestock to Swift's private side track, either (1) by acquiring a right of way and constructing a track from the New York Central's main line to Swift's private side track, or (2) by making the deliveries over the private side track of the Stock Yards. Resort to the first alternative is a requirement which the Commission lacked statutory authority to impose. Resort to the second alternative is precluded by the private side

track agreement, executed by the Stock Yards and the New York Central in 1935. In consequence, the District Court correctly held that the Commission exceeded its authority, and that enforcement of its order should be enjoined. The judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

Interstate Commerce Act, as Amended (49 U. S. C. 1 et seq.)

SECTION 1(3)(a). * * * The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property * * *.

SECTION 1(6). It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SECTION 1(9). Any common carrier subject to the provisions of this chapter, upon application of any lateral,

branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this chapter, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this chapter, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

SECTION 3(1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular descrip-

tion of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 2, Elkins Act (49 U. S. C. 42).

In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 223

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL.,
Appellants

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR THE CLEVELAND UNION STOCK YARDS COMPANY, APPELLEE

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
Proceedings before the Commission	12
Proceedings in the District Court	15
Summary of Argument	19
Argument	26
I. The Stock Yards, as owner of Track 1619, has the right to limit the use of the track to such transportion thereon as does not interfere with its own business	28
A. The Stock Yards' ownership of Track 1619 is undisputed	29
B. The Stock Yards has in no manner surrendered to the railroad its right to control the use of Track 1619	37
C. The Stock Yards has not in any manner surrendered its control over Track 1619 to the public, including Swift & Company	43
D. The Stock Yards, as owner of Track 1619, is entitled to condition its use	50
II. The Commission is not empowered to limit the Stock Yards' control over use of Track 1619	53
A. The Stock Yards is not subject to the regulatory authority of the Commission	53
The Interstate Commerce Act does not authorize the Commission's order against the Stock Yards	54

Page

Section 2 of the Elkins Act does not empower the Commission to issue the order in question 65

B. The trackage agreement governing the use of Track 1619 is not subject to the Commission's control 77

III. The Commission's order is invalid 98

Conclusion 103

Appendix A: Pertinent Statutory Provisions 104

CITATIONS—Continued

Cases:

	Page
Abandonment by Chicago, Rock Island and Pacific Ry. Co., 131 I.C.C. 421	43, 96
Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 68 S. Ct. 167	39
Alabama Central R.R. Co. v. Alabama Public Service Commissioners, 200 Ala. 536	25, 43, 90
Alexander King Stone Co. v. Chicago, I. & L. Ry. Co., 160 I.C.C. 245	102
Alford v. Chicago, Rock Island and Pacific Ry. Co., 3 I.C.C. 519	21, 25, 43, 56, 81, 92, 98
Alton R.R. Co. v. Illinois Commerce Commission et al., 305 U.S. 548	33
Armour and Company v. Alton Railroad Co., 312 U.S. 195	13
Arn v. Chesapeake and O. Ry. Co., 171 Ky. 157	51
Atchison, Topeka and Santa Fe Ry. Co. v. United States, 295 U.S. 193	102
Atlantic Coast Line R.R. v. Phillips, 332 U.S. 168	34
Baltimore & Ohio Ry. v. United States, 277 U.S. 291	24, 69
Baltimore and Ohio Railroad Co. v. United States, 298 U.S. 349	13
Bass v. Metropolitan West Side Electric R.R., 82 Fed. 857	100
Beaumont S. L. and W. Ry v. United States, 282 U.S. 74	102
Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. 441	43
Black & White Taxi Co. v. B. & Y. Taxi Co., 276 U.S. 518	23, 60
Board of Trade of Kansas City v. United States, 314 U.S. 534	13
Certain-Teed Products Corp. v. C.R.I. & P. Ry Co. et al., 68 I.C.C. 260	26, 102
Chicago, M. & St. P., and P. R. Co. Trustees Operation, 247 I.C.C. 1	21, 24, 43, 78, 96
Cincinnati v. Railroad Co., 88 Oh. St. 283	40
City of Cincinnati v. The Lessee of White, 6 Peters 431	45
City of Noblesville v. Lake Erie and W. R. Co., 130 Ind. 1	51
Del, L. & W. R.R. v. Morristown, 276 U.S. 182	60, 75
Ellis v. Interstate Commerce Commission, 237 U.S. 434	23, 24, 27, 58, 63, 67, 77
Ex Parte Koehler, 30 Fed. 867	59
F. C. Ayres Mercantile Co. v. Union Pacific Ry., 16 F.(2d) 395	34
Faulkner v. Hook, 300 Mc. 135	51
Florida v. United States, 282 U.S. 194	102
Gary v. Powell, 314 U.S. 402	13
General American Tank Car Corporation v. Eldorado Terminal Co., 308 U.S. 422	13, 23, 62, 75
Glens Falls Portland Cement Co. v. Delaware and Hudson Co., 66 F. (2d) 490	75

CITATIONS—Continued

	Page
Gracie v. *Palmer*, 8 Wheat. 605	54
Hairston v. *Danville and Western Ry.*, 293 U.S. 598	34
Henry v. *The Columbus Depot Co.*, 135 Oh. St. 311	40
Hocking Domestic Coal Co. v. *K. & M. Ry. Co.*, 44 I.C.C. 392	21, 25, 43, 84, 95
Huddleston v. *Dwyer*, 322 U.S. 232	39
Illinois Central Railroad Co. v. *Interstate Commerce Commission*, 206 U.S. 441	13
Interstate Commerce Commission v. *Chicago, Burlington and Quincy Ry. Co.*, 186 U.S. 320	102
Jones Island Realty, Inc. v. *Middendorf*, 191 La. 456	51
K. & M. Ry. Co. v. *Public Utilities Comm'n of Ohio*, 96 Oh. St. 414	25, 43, 84, 95
Lessee of the Incorporated Village of Fulton v. *Mehrenfeld*, 8 Oh. St. 440	22, 45, 46, 48
Limits Industrial Building Corp. et al. v. *B. & O. Co.*, 258 I.C.C. 438	26, 101
Louisiana ex rel. Francis v. *Resweber*, 329 U.S. 459	39
Louisville & Nashville R.R. v. *Mottley*, 219 U.S. 467	34, 55
Lynchburg Traction and Light Co. v. *Lynchburg*, 142 Va. 255	22, 51
Merchants Refrigerating Co. v. *New York Central R.R.*, 238 I.C.C. 599	97
Milheim v. *Moffett Tunnel District*, 262 U.S. 710	34
Minnesota v. *Probate Court*, 309 U.S. 270	39
Missouri-Kansas-Texas R.R. Co. v. *K.C.T. Ry. Co.*, 104 I.C.C. 203	97
Morehead v. *New York ex rel Tipaldo*, 298 U.S. 587	39
Morgan v. *Railroad Co.*, 96 U.S. 716	22, 45, 48
Morgan Run Ry. v. *Public Utilities Commission*, 98 Oh. St. 218	84
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	75
New York, N. H. & H. R.R. v. *Interstate Commerce Commission*, 200 U.S. 361	75
Northern Pacific R.R. v. *Smith*, 171 U.S. 260	100
Oklahoma, etc. R. Co. v. *Dunham*, 39 Tex. Civ. App. 575	51
Osborne v. *Missouri Pacific Ry.*, 147 U.S. 248	100
Panama Refining Co. v. *Ryan*, 293 U.S. 388	102
The Parmelee Transfer Company Case, 12 I.C.C. 40	59
Pennsylvania R. Co. v. *Public Utilities Comm'n*, 298 U.S. 170	23, 59
Penquite v. *Lawrence*, 11 Oh. St. 274	22, 45, 46
Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591	13
Powers v. *Railway Co.*, 33 Oh. St. 429	40
Producers Transportation Co. v. *Railroad Comm'n of California*, 251 U.S. 228	29, 75

Page

Railroad Co. v. *The Village of Roseville*, 76 Oh. St. 108 ..... 22, 45, 47
Refrigerator Car Mileage Allowances, 232 I.C.C. 276.. 23, 60
Rex Jellico Coal Co. et al. v. *Louisville & Nashville Ry. Co.*, 237 I.C.C. 67..... 26, 102
Roberts v. *Northern Pacific R.R.*, 158 U.S. 1..... 100
Rochester Telephone Corp. v. *United States*, 307 U.S. 125 13
Rock Island Ry. v. *Rio Grande R.R.*, 143 U.S. 596. 21, 25, 43, 80
Salt Lake City v. *Hollister*, 118 U.S. 256..... 25, 100
St. Louis etc. Ry. Co. v. *Brownsville District*, 304 U.S. 295 13
Secombe v. *Milwaukee, etc., R. Co.*, 23 Wall. 108..... 25, 100
Shoemaker v. *United States*, 147 U.S. 282..... 41
Sholl Brothers v. *Peoria and Pekin Ry. Co.*, 276 Ill. 267, 25, 43, 87
Spencer Kellogg and Sons v. *United States*, 20 F. (2d) 459, cert. den. 275 U.S. 566..... 75
State v. *Hoboken*, 59 N.J. Law 383..... 51
Tap Line Cases, 234 U.S. 1..... 13
Texas & N. O. R. Co. Operation, 249 I.C.C. 595..... 43, 96
Thompson v. *Texas-Mexican R. Co.*, 328 U.S. 134..... 24, 79
Todd v. *Pittsburgh*, 19 Oh. St. 514..... 21, 39, 40, 45
Toledo & Wabash Ry. Co. v. *Daniels et al.*, 16 Oh. St. 390 40
Union Lime Co. v. *Chicago & Northwestern Ry. Co.*, 233 U.S. 211..... 33
Union Pacific Ry. Co. v. *Chicago, etc. Ry. Co.*, 163 U.S. 564 ..... 21, 25, 42, 43, 80, 81, 82, 100
Union Pacific R. v. *United States*, 313 U.S. 450..... 69, 75
United States v. *Gettysburg Electric Ry.*, 160 U.S. 668.. 41
United States v. *Interstate Commerce Commission*, 71 F. (2d) 336 97
United States ex rel. Chicago, etc. v. *Interstate Commerce Commission*, 294 U.S. 50..... 97
United States v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007 75
United States v. *Lynah*, 188 U.S. 445..... 100
United States v. *Phillips Petr. Co.*, 36 F. Supp. 480.... 75
United States v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 13
Village of Bradley v. *New York Central R.R. Co.*, 296 Ill. 383 ..... 22, 51
Virginian Ry. Co. v. *United States*, 272 U.S. 658..... 13
Wagner v. *Railway Co.*, 38 Oh. St. 32..... 25, 40, 100
Wilson v. *North Carolina*, 169 U.S. 586..... 39
Winnsboro Granite Corporation v. *Southern Ry. Co.*, 176 I.C.C. 481 102
Wisby v. *Bonte*, 19 Oh. St. 238..... 22, 45, 46

CITATIONS—Continued

	Page
Wright v. *Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440	76
Yakus v. *United States*, 321 U.S. 414	13
Constitution of the United States:	
Amend. 5	30
Statutes:	
Elkins Act:	
Sec. 1 (49 U.S.C. 41)	69, 70
Sec. 2 (49 U.S.C. 42)	14, 23, 24, 26, 65, 66, 67, 68, 70, 72, 74, 75, 76
Sec. 3 (49 U.S.C. 43)	70, 76
Hepburn Act	55
Interstate Commerce Act, as amended, Part I (49 U.S.C. 1 *et seq.*):	
Sec. 1 (1)	59, 65
Sec. 1 (3)	11, 23, 27, 34, 54, 57, 58, 60, 63, 64
Sec. 1 (5)	11
Sec. 1 (6)	14
Sec. 1 (7)	55, 57
Sec. 1 (8)	57
Sec. 1 (9)	14
Sec. 1 (14)	23, 63, 64
Sec. 1 (18)	11, 24, 77, 85, 96
Sec. 1 (19)	11
Sec. 1 (20)	11
Sec. 2	11, 57
Sec. 3 (1)	11, 12, 57
Sec. 3 (5)	41
Sec. 5 (2)	24, 78
Sec. 6	57
Judicial Code:	
Sec. 210, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of Oct. 22, 1913, 38 Stat. 220 (28 U.S.C. 47a)	2
Sec. 238, as amended by the Act of Feb. 13, 1925, 43 Stat. 938 (28 U.S.C. 345)	2
National Transportation Policy (Act of Sept. 18, 1940, 54 Stat. 898)	29, 30, 79
Packers and Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*)	4, 9, 35
Page's Ohio General Code (Annotated):	
Sec. 501	85
Sec. 502	85
Sec. 614-3	85
Sec. 6886	46
Sec. 8754	39

	Page
Sec. 8759	39
Sec. 8760	39
Sec. 8761	39
Sec. 8763	39
Sec. 8764	39
Sec. 8767	39
Sec. 11038	39
Sec. 11039	39
Sec. 11042	39
Sec. 11046	39
Sec. 11047	39
Sec. 11048	39
Transportation Act of 1940, 54 Stat. 898	23, 63, 78
United States Code:	
28 U.S.C. 47	1
49 U.S.C. 1001 *et seq.*	65
Miscellaneous:	
Congressional Record:	
Vol. 36, pp. 1632-1634	73
Vol. 36, pp. 2151-2159	24, 73
Vol. 36, p. 2158	74
1 Elliott on Roads and Streets (2nd Edition), Sec. 148	22, 51
Fifteenth Annual Report of the Interstate Commerce Commission (1901), pp. 5-16	24, 71
Hearings, Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1310, 2016, 1869, and 2009:	
p. 434	63
p. 558	63
pp. 787-787	64
House Report No. 3765, 57th Cong., 2nd Sess., Feb. 12, 1903 (To accompany S. 7053), pp. 5-6	24, 72
House Report No. 2832, 76th Cong., 3rd Sess. (To accompany S. 2009), p. 65	64
Seventeenth Annual Report of the Interstate Commerce Commission (1903), pp. 5-10	24, 71
Thompson on Real Property (Permanent Edition, Revised and Enlarged):	
Sec. 487	47
Sec. 481	45
Sec. 482	45
Sec. 483	45
Sec. 485	45
Sec. 487	45
Sec. 490	22, 45, 52
Twelfth Annual Report of the Interstate Commerce Commission (1898), pp. 5 *et seq.*	24, 71

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 223

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL.,

Appellants

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR THE CLEVELAND UNION STOCK YARDS COMPANY, APPELLEE

OPINION BELOW

The opinion of the specially constituted district court (R. 148-152) is reported in 71 F. Supp. 499. The report of the Commission (R. 28-50) is reported in 266 I.C.C. 55.

JURISDICTION

The final order and judgment, here for review on appeal, was entered on May 14, 1947 (R. 190), in the District Court of the United States for the Northern District of Ohio, Eastern Division, by a statutory court consisting of one Circuit and two District Judges, specially convoked under the provisions of 28 U.S.C. 47, permanently en-

joining the enforcement of the order (R. 65-66) of the Interstate Commerce Commission, entered pursuant to its report of May 3, 1946 (R. 28-50; 266 I.C.C. 55). A single petition for appeal was filed by the appellants on July 11, 1947 (R. 191-192), and was allowed the same day (R. 192). Appellees filed a motion to affirm, but this Court noted probable jurisdiction on October 13, 1947 (R. 619). The jurisdiction of this Court rests on Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220 (28 U.S.C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C. 345).

QUESTIONS PRESENTED

1. Whether a non-carrier, in permitting a common carrier by rail to use its private track, may limit the use of the track to the movement of such traffic as will not interfere with its business.

2. Whether the Interstate Commerce Commission has authority to require a non-carrier to permit the use of its private track by a common carrier by rail in contravention of a trackage agreement between the parties.

STATUTES INVOLVED

The Cleveland Union Stock Yards Company (hereinafter referred to as the "Stock Yards") is satisfied with the statement of the provisions of the Interstate Commerce Act, as amended, and of the Elkins Act, as set forth in Appendix A, pages 77-90, of the brief for the United States and the Interstate Commerce Commission (here-

inafter referred to as the "Government's brief"). However, for the convenience of the Court, additional provisions of such Acts are set forth in Appendix A of this brief, since reference hereinafter is made thereto.

STATEMENT

There is no dispute between the parties in the case at bar as to the essential facts upon which depend a solution to the controversy. However, the Stock Yards believes that it is necessary to make a more inclusive statement of the facts than that contained in the Government's brief, in order that the respective rights and liabilities of the various parties may be determined in their proper perspective.

The present appeal (R. 191-192) is from a final order and judgment (R. 190) entered by the court below, which granted relief demanded by the non-carrier and common carrier appellees in two actions (R. 4; R. 88)[1] brought to enjoin enforcement

[1] The appellees consist of the following common carriers by rail: The Baltimore & Ohio Railroad, the Pennsylvania Railroad, the Erie Railroad, the Wheeling & Lake Erie Railroad, and the New York Central Railroad (the last mentioned carrier is the successor in interest to the Cleveland, Cincinnati, Chicago, and St. Louis Railroad, hereafter referred to in this brief as the "Big Four"). In addition, the Stock Yards, a non-carrier, having contractual relations with the New York Central with respect to a certain industrial sidetrack, located on the Stock Yards' land and owned by it, is also an appellee. All of the appellees were respondents in the proceeding instituted by Swift & Company before the Interstate Commerce Commission in September, 1941, and, in addition, the New York, Chicago, and St. Louis Railroad (sometimes referred to in the record as the "Nickel Plate"), and the Livestock Terminal Service Company were also respondents in the proceeding before the Commission.

of an order of the Interstate Commerce Commission (R. 65-66; 266 I.C.C. 55), which had ordered all of the appellees to refrain from refusing to deliver livestock to the sidetrack of Swift & Company at Cleveland, Ohio, and to establish and maintain tariffs providing for the delivery to Swift & Company at such place of its interstate shipments of livestock carried over the lines of the appellees herein which are common carriers by rail and consigned to Swift & Company.

The Cleveland Union Stock Yards Company was incorporated under the laws of the State of Ohio in 1893 for the purpose of operating a general stockyards business, and since that time it has been continuously engaged in operating a public stockyards on West 65th Street in Cleveland, Ohio (R. 89). It is a stockyard subject to the provisions of the Packers and Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*) (R. 90).

In 1899 the Stock Yards, desiring a side track for use in connection with its business in Cleveland, entered into an agreement (Exhibit 14; R. 347-350) with the Big Four (to whose lines the New York Central Railroad Company succeeded in 1930). The main line of the railroad company passes along the northern side of the Stock Yards' premises in a general easterly-westerly direction. By the terms of the agreement, the Big Four constructed 1619 feet of sidetrack, extending southward on the property of the Stock Yards, and connecting with the main line by means of an initial turnout of 132 feet owned by the railroad and located on its land. (See the green and yellow tracks

on the map appearing in Appendix B of the Government's brief.) The track owned by the Stock Yards (hereinafter referred to as "Track 1619") runs parallel with West 65th Street (formerly known as Gordon Street) on the eastern edge of the Stock Yards' premises. The 1899 agreement provided that the Stock Yards would do the necessary grading and pay the costs of constructing and maintaining the side track. The railroad had the right to use the siding, without cost, in connection with other business than that of the Stock Yards when the track was not occupied by the Stock Yards, provided such use did not interfere with the business of the Stock Yards. The contract contained a sixty-day termination clause (Ex. 14; R. 347-350).

As noted in the statement contained in the Government's brief, the 1899 agreement between the Stock Yards and the railroad was superseded by an agreement dated June 16, 1924 (Ex. 9, R. 339)[2]. The 1924 agreement contained a thirty-day termination clause (R. 341).

Paragraph 4 of the 1924 agreement was also

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[2] Paragraph 4 of the agreement of June 16, 1924, provided as follows:

> "Fourth. All of said tracks, irrespective of ownership, shall be maintained by the railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, (b) the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land."

amended, effective February 1, 1935.[3] Under the terms of the amended agreement in 1935 the railroad was permitted to use Track 1619 except for competitive traffic, i.e., livestock, with respect to which it was agreed that the parties would have to make a separate contract as to the charge.

Swift & Company purchased the Peoples Packing Company on January 24, 1905. In 1907, Swift & Company began negotiating[4] with the Big Four to secure a connection between its plant located between West 65th Street and West 63rd Street (then known as Prim Street) and the main line of the railroad. Between 1907 and 1910, the plan

[3] The amendment was accomplished by amending the fourth paragraph to the 1924 agreement to read as follows:

> "Fourth. All of said tracks, irrespective of ownership, shall be maintained by the Railroad without expense to the Industry; in consideration for which the Industry shall and by this instrument does grant to the Railroad, (a) the free occupancy of its land by any and all tracks or portions thereof located thereon belonging to the Railroad, and (b) the free and uninterrupted use, *except for competitive traffic a charge for which use shall be the subject of a separate agreement*, of any and all tracks or portions thereof belonging to the Industry and located on its land." (Emphasis supplied.)

[4] Exhibit No. 11 (R. 343-347) contains a stipulation entered into by the parties with respect to some of the facts respecting the negotiations under consideration. Many of the original letters and other correspondence evidencing transactions at this time were destroyed in a flood in Cincinnati, and the stipulation is based upon some missing documents discovered while this case was pending before the Commission. Reference to this Exhibit will disclose that the implication by Swift & Co. that it never had an opportunity to obtain a direct connection with the main line of the railroad is contrary to the stipulated facts. (See Swift's brief, p. 49.)

upon which Swift & Company worked to secure such a rail connection consisted in building a side-track northward along West 63rd Street until it would meet the main line of the railroad running east and west through the city (see map in Appendix B to the Government's brief).

In order to carry out this plan, Swift & Company secured the passage of an ordinance by the city of Cleveland dated May 25, 1908, authorizing the railroad company to construct a spur and side-track as indicated along West 63rd Street (R. 449). Since it would also be necessary to condemn part of the land of the Lake Erie Provision Company in order to construct this track, Swift & Company induced the Big Four to file condemnation proceedings against such company to procure the necessary land.[5]

The total cost of building the track, including the damages awarded to the Lake Erie Provision Company, amounted to approximately $24,500. Swift & Company was unwilling to pay more than $2,000 of this total. It expected the railroad or the other packers along West 63rd Street who also would be benefited to pay the remainder. Consequently, the plan to build a track up West 63rd Street and to secure a direct connection with the railroad company's main line was abandoned.

In March, 1910, Swift & Company approached the railroad with another plan, which proposed

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[5] Upon the petition of the Big Four, the Court of Insolvency of Cuyahoga County, Ohio, at the May 1909 term, approved of the condemnation of the land of the Lake Erie Provision Company and awarded damages in the sum of $13,500 (Ex. 11, R. 344).

that it be served by utilizing Track 1619 owned and operated by the Stock Yards. After some negotiations, this plan was adopted. To effectuate it, Swift & Company secured the passage of another ordinance by the city of Cleveland on September 6, 1910, permitting a track to be built across West 65th Street (R. 416-417). The railroad constructed a track 793 feet long connecting with the southerly end of Track 1619. In this manner, Swift secured a connection with its private siding.

Swift & Company knew in 1910 at the time it finally decided to put into effect the alternative plan just mentioned, rather than to build a direct connection with the main line of the railroad, that the Stock Yards owned and operated Track 1619.[6]

After the connection above-mentioned was made with the private sidetracks of Swift & Company,

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[6] The following other companies, besides Swift & Company, have, since 1910, been located so as to secure connections with the main line of the New York Central Railroad Company by way of Track 1619: Standard Beef Company (Ex. 33, R. 425); Kreinberg and Krasney (Ex. 34, R. 426); Earl C. Gibbs (Ex. 35, R. 427); Hughes Provision Company (Ex. 41, R. 432); Koblenzer Brothers (Ex. 42, R. 433); and Theurer-Norton Provision Co. (Ex. 43, R. 434). The private sidetracks of all of these industries, including those of Swift & Company, were constructed and are maintained under conventional sidetrack agreements between the industries and the New York Central Railroad, and each of these agreements contains provisions permitting termination of the arrangement upon short periods of notice.

Other packers located in Cleveland, the Lake Erie Provision Company, the Long Dressed Beef Company, and Ohio Provision Company, are served by the common carriers operating in Cleveland without using the industrial sidetrack belonging to the Stock Yards (R. 32-33). These packers have connections direct with the main line of the New York Central.

the railroads published tariffs showing deliveries to Swift & Company at Cleveland, Ohio, at line haul rates. The common carriers, other than the New York Central, made such deliveries to Swift & Company by virtue of a reciprocal switching arrangement under which the New York Central made deliveries from and to such other carriers and Swift & Company over Track 1619 in accordance with a switching charge which was absorbed by the carriers.

Prior to 1930, Track 1619 was used for making few, if any, deliveries of livestock to the siding of Swift & Company. Before that time, Swift & Company and the packers in the area were accustomed to receiving livestock through the yards of the Stock Yards Company.

Yardage charges are assessed by the Stock Yards, as approved by the Secretary of Agriculture pursuant to the Packers and Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*), on direct shipments of livestock received at the Yard.

Before 1930, Swift & Company was directly interested, financially, in the Stock Yards Company. It owned a substantial number of the shares of such Yard; the manager of Swift & Company was on the Board of Directors of the Stock Yards Company; and there were, otherwise, close personal and financial connections. As early as 1921 Swift & Company, as a result of anti-trust litigation against it, was ordered to divest itself of ownership in such companies as the Stock Yards. By an order entered in the anti-trust suit in 1931, Swift & Company was given a period of time (until 1936) to divest itself of all such control.

Between 1930 and 1934, Swift & Company had 1161 carloads of livestock delivered direct to its siding at line haul rates to Cleveland. During the same period, it received 2260 carloads of livestock through the Stock Yards (R. 34). The volume of movement of livestock over its track direct to Swift & Company became so substantial that, in late 1934, in order to protect its interests, the Stock Yards notified the railroads that the 1924 agreement covering use of Track 1619 would be terminated (Ex. 31, R. 423). The expressed reason for such action was that the Stock Yards Company could not permit its facilities thus to be used for competitive purposes (see, also, Ex. 32, R. 424). However, before the termination of the agreement took place, the amendment, effective February 1, 1935, previously noted, was made. By such amendment the carriers were permitted to continue to use Track 1619 with respect to all commodities other than livestock; and it was stipulated that the track would not be used for shipping livestock in the absence of a special agreement therefor providing compensation to be agreed upon by the parties (Ex. 48, R. 437-442). Under this arrangement, since 1935, inbound and outbound shipments to and from Swift & Company of all commodities other than livestock have been continued.

The carriers were never able to agree with the Stock Yards upon a charge to be made for the use of Track 1619 for livestock purposes, since the carriers were unwilling to pay the amount proposed by the Stock Yards, namely, an amount equivalent to what the Stock Yards would receive

as yardage charges if shipments of livestock were made through the yards.

Accordingly, the carriers notified Swift & Company and the other industries served by utilizing Track 1619, on October 6, 1938, that they would be unable to make any further shipments of livestock over this track.[7] Also, the New York Central Railroad Company, effective November 12, 1938, canceled its reciprocal switching charge applicable on shipments moving into Cleveland by way of other carriers. The result of this was to leave no published tariff, with respect to these other carriers, showing deliveries of livestock to Swift & Company. In 1941, Swift & Company demanded of the carriers that they make shipments of livestock direct to its siding, by traversing Track 1619, but the carriers refused unless Swift & Company first made arrangements with the Stock Yards Company for the use of such track (Ex. 4, R. 317 and Ex. 5, R. 318). Thereafter, Swift & Company in September, 1941, filed its complaint with the Commission.[8]

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[7] Ex. 33, R. 425; Ex. 34, R. 426; Ex. 35, R. 427; Ex. 36, R. 428; Ex. 37, R. 429; Ex. 41, R. 432; Ex. 42, R. 433; and Ex. 43, R. 434. In addition, Swift & Company and the railroads exchanged other letters with reference to the subject. Ex. 37, R. 429; Ex. 38, R. 430; Ex. 39, R. 430; Ex. 40, R. 431.

[8] None of the other six packers who are situated similar to Swift & Company with respect to Track 1619, has complained or otherwise participated in this proceeding. The complaint charged violations of the following sections of the Interstate Commerce Act, as amended: 1(5), 1(3), 1(18), 1(19), 1(20), 2, 3(1). In general, the complaint was based upon the refusal of the common carriers to deliver all commodities, including livestock, to the private siding of Swift & Company, at line haul rates. In addi-

Proceedings before the Commission: Two hearings were conducted before examiners appointed by the Commission, the first on April 22, 1942 (R. 203-232). The examiner filed a report recommending that the complaint be dismissed. Exceptions were taken by Swift & Company to such report and thereafter, on June 4, 1943, the Commission heard oral argument (R. 465-502). The Commission, on its own motion, ordered the proceeding reopened for the taking of further testimony, and this was done in a hearing held on June 22, 1944 (R. 235 *et seq.*) before two examiners. The examiners again prepared a report recommending that the complaint be dismissed. The matter came on once more for oral hearing before the Commission on October 3, 1945 (R. 502-546). On May 3, 1946, the Commission issued its order (R. 64-65) based upon its report (R. 28, *et seq.*), appearing in 226 I.C.C. 55. The Commission did not make separate findings of fact.[9]

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tion, an unreasonable preference and an unreasonable prejudice based on Section 3(1) of the Act was predicated upon the fact that other companies located at Cleveland (the Lake Erie Provision Company, the Ohio Provision Company, and the Long Dressed Beef Company), also engaged in the meat-packing business, did receive shipments of livestock at their respective plants at line haul rates. Such plants have direct connections with the main line of the New York Central and it is unnecessary to use Track 1619 in order to reach them. See Note 6, *supra*.

[9] This proceeding presented for decision to the Commission, as it later presented to the court below, and as it now presents to this Court, only questions of law. There are no issues between the parties as to factual controversy. While there are many facts covering a long

In its report the Commission held that, by the series of agreements between the Stock Yards and the railroad respecting Track 1619, the Stock Yards had contracted for the public use of its

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period of time to be taken into consideration in reaching decision on the legal issues, the Commission was not called upon and had no occasion to make any administrative decisions on discretionary matters committed to its expert judgment. Thus, the proceeding did not require the exercise of expert judgment of a "tribunal appointed by law and informed by experience," *Illinois Central Railroad Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454, as to complicated factual issues relative to technical transportation matters. Hence, prior decisions by this Court, *General American Tank Car Corporation* v. *Eldorado Terminal Co.*, 308 U. S. 422, 433; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 138-140, 146; *Armour and Company*, v. *Alton Railroad Co.*, 312 U. S. 195; *St. Louis &c. Ry. Co.* v. *Brownsville District*, 304 U. S. 295, 301; *Yakus* v. *United States*, 321 U. S. 414, 433; *Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602; *Baltimore and Ohio Railroad Co.* v. *United States*, 298 U. S. 349, 358; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665; *Board of Trade of Kansas City.* v. *United States*, 314 U. S. 534, 546; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 535-536; *Gray* v. *Powell*, 314 U. S. 402, 411, 412, wherein the Court expressed the due regard to be ascribed to the Commission's judgments with respect to administrative and other discretionary matters committed to its expert judgment, are not applicable to the Commission's determinations in the case at bar, since the issues which the Commission undertook to decide here were largely matters of Ohio real property law as to which the Commission has no expert knowledge. The appropriate approach by the Court to the solution of the issue between the parties as to the proper legal conclusion to be drawn from the facts admitted on all sides is indicated in the following passage written by Mr. Justice Day in the *Tap Line Cases*, 234 U. S. 1, 22:

> "It is further insisted upon the authority of *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, and other cases in this court which have followed that decision, that in the present cases the

track (R. 36-38) and that, as a result, Track 1619 had become part of the facilities of the New York Cent al's railroad. The Commission held that the failure of the railroads to deliver livestock over the track to the siding of Swift & Company constituted a violation of Sections 1(6), 1(9), and 3(1) of the Act.[10] The Commission held ineffectual the contractual limitation by the Stock Yard of the right to use the track for livestock purposes, saying that the insistence of the Stock Yards upon the payment demanded for such use of its track (i. e., a payment equivalent to yardage charges), coupled with the limitation of the use of the track for livestock purposes in the 1935 agreement, constituted a "penalty" (R. 40).

With respect to its authority to issue an order against the Stock Yards, the Commission held that "The Stock Yards is a proper party defendant in this proceeding, as its interests are directly affected by the rates, regulations, or practices, under consideration within the meaning of Sec. 2 of the Elkins Act, 49 USCA, Sec. 42 shown in the footnote." Thereupon the Commission issued its

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decision rests upon conclusions of the Commission as to matters of fact only, which are within the sole jurisdiction of that body and not reviewable in the courts. But we shall consider the case upon the findings of fact preceding this opinion, which are identical with those made by the Commission, and test the conclusions reached as matters of law, giving proper consideration to matters of fact which are not in dispute."

See, also, note 37, *infra*.

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[10] The complaint did not even allege violations of sections 1 (6) and 1 (9) of the Act. See note 8, *supra*.

order against all of the common carriers and against the Stock Yards. Three of the Commissioners (Barnard, Patterson, and Splawn), dissented (R. 45-49). Commissioner Aitchison did not participate. Petitions for reconsideration were filed and overruled.

Proceedings in the District Court: The common carrier appellees and the Stock Yards filed separate actions in the District Court of the United States for the Northern District of Ohio, Eastern Division, (R. 4, R. 88), to enjoin enforcement of the order of the Commission on the ground that it transcended its authority in issuing its order of May 3, 1946. The action filed by the Stock Yards was consolidated with the action filed by the common carrier appellees for purposes of trial on February 25, 1947 (R. 96); and the findings of fact and conclusions of law entered by the court below on May 9, 1947 (R. 178), and the final order and judgment of the court below entered on May 14, 1947 (R. 190), dealt with both cases. The United States and the Interstate Commerce Commission were named as parties defendant in both actions in the court below. The appellant, Swift & Company, was permitted to intervene and file an answer. (R. 66; 104).

After oral argument before the specially constituted three-judge court on February 25, 1947, the court rendered its opinion on March 11, 1947 (R. 148) which is reported in 71 F. Supp. 499.

In its opinion the court stated that (R. 149):

> "We are mindful of the Commission's powers and of the effect to be given its findings in respect of matters within its juris-

diction. In this case we consider only the legality of its order upon the record. The railroad complains that the Commission's order requires it to do an unlawful act and that it cannot comply with the order because it is without control over the Stock Yards' property and Track 1619; that the contract for the use of the track excludes the transportation of shipments of livestock to Swift & Company and that it, the railroad, is without the means of accomplishing what the Commission orders. The Stock Yards Company asserts that the Commission is without jurisdiction as to it and that even if it has jurisdiction and power to enter a lawful order against it the order made is unlawful in that it appropriates its property without due process of law.

* * *

"We address ourselves to what we conceive to be the principal and fatal flaw in the Commission's order. We assume, without deciding, that under the Elkins Act the Commission has jurisdiction over the Stock Yards Company when made a party as in this case and has the power to enter a lawful order affecting the Stock Yards in respect of matters in which the Commission has authority."

The court thereupon held that the Commission had erred as a matter of law in ordering the railroads to deliver livestock to Swift & Company's siding over the 1619 feet of track of the Stock Yards Company which is wholly private property. The court pointed out that all of the Commission's conclusions were based upon its basic conclusion

that Track 1619 had been devoted to public use. In this connection the court said (R. 150):

> "We think the finding does not have legal support in the record since it leaves out of consideration the fact that such use has been made from the beginning to the end under the provisions of a written contract expressly asserting ownership and reserving therein the property right of the Stock Yards Company limiting the character of shipments and made mutually terminable upon 30- and 60-day notices, respectively. Certainly, upon these facts and upon the record there has been no such devotion of Track 1619 to public use as to amount to a dedication of the Stock Yards property as a public highway or as a part of the Railroad Company's system over which the latter lawfully may move shipments of freight or livestock to the Swift & Company plant."

The court said, further (R. 151):

> "Here, the Stock Yards Company never has acquiesced in any use of its land by the Railroad or Swift & Company except by the provisions of the contracts. The entrance upon the land of the Stock Yards Company and the use of its track were not by sufferance but under the terms of a written contract, the provisions of which were well understood by Swift & Company as well as by the Railroad.
>
> "Although the Commission holds that Track 1619 is now and for some years has been devoted to the public use *this is far from concluding that the Stock Yards has lost or surrendered ownership and control of its property when over all that period it*

has constantly, consistently, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track. Every person serving, or being served by the use of Track 1619 has had full knowledge of that fact. No one has been led to act to his harm by any sufferance or acquiescence, or by any failure upon the part of the Stock Yards Company openly to assert its complete ownership and restrict its use." (Emphasis supplied).

With respect to the contention made both before the Commission and before the court below on behalf of appellants to the effect that Track 1619 had become a part of the New York Central Railroad Company and that the railroad company could not lawfully refuse to utilize such track or to contract for its limited use, the court said (R. 152):

"* * * If the Railroad was out of bounds in entering into a contract with the Stock Yards Company which permitted withdrawal of service to Swift & Company, its wrongful conduct, if such it was, cannot be rectified by penalizing the Stock Yards Company and by taking part of its property. If the Commission lawfully may compel the Railroad Company to use Track 1619 as its own or as one which it controls it would by such order, in effect be declaring an appropriation of property belonging to a private owner, thus undertaking to exercise a power which it does not possess. The order effectually subordinates and subjects the Stock Yards Company's owner-

> ship of its property to the beneficial and preferential use of Swift & Company without due process of law."

The court found it unnecessary to decide, in view of its decision reached on the question of whether the property had been devoted to a public use, whether the Commission or the court below had jurisdiction over the Stock Yards Company under the Elkins Act. As to this the court said (R. 152):

> "We think that jurisdiction of the Stock Yards Company, if it does exist under the meaning of the Elkins Act, does not furnish constitutional or legal power in the Commission to order the Stock Yards Company to desist from the practice of asserting or exercising complete ownership of its property. The Commission cannot, as we think, lawfully order the Railroad to do what by law is forbidden by declaring that the Stock Yards Company's track under the circumstances here is a part of the New York Central Railroad system. Such transfer of property lawfully cannot be made short of condemnation and compensation."

The court below accordingly enjoined the enforcement of the order of the Interstate Commerce Commission (R. 190). The appeal heretofore noted to this court followed (R. 192).

SUMMARY OF ARGUMENT

The fundamental error committed by the Commission in this case is that it undertook to strip the Stock Yards of its rights as owner of Track 1619 in excess of any authority conferred upon the

Commission by the Interstate Commerce Act, as amended, and thus deprived the Stock Yards of its property without due process of law.

I

The Commission's order directs the Stock Yards, which is neither a carrier nor a shipper, and the common carriers by rail (1) to cease and desist from refusing to deliver, and (2) to establish and put in force, and maintain in force thereafter, a schedule providing for the delivery of, to the side-track of Swift & Company, its interstate shipments of livestock carried over the lines of the common carrier and consigned to Swift's plant at Cleveland.

It is plain that the order is incapable of being performed by the Stock Yards, since the Stock Yards is not engaged in the business of delivering livestock by rail.

A. There has never been any question but that the Stock Yards is the owner of Track 1619 and of the land on which it is located. While the Stock Yards' ownership is conceded by appellants, they take the position that ownership is immaterial and rely instead on the Commission's finding that the Stock Yards' track is a part of the railroad system of the New York Central. On the contrary, the Stock Yards has committed no act, nor acquiesced in the conduct of others, by which it could lawfully be held to have divested itself of its right as owner to use its property for its benefit and to prevent it from being used to its disadvantage.

B. In Ohio a railroad can acquire property in only three ways: by gift, by conveyance, or by ap-

propriation in accordance with statute. *Todd v. Pittsburg*, 19 Oh. St. 514. In Ohio a railroad corporation cannot acquire property by way of dedication. It is clear that the New York Central has no title to or interest in Track 1619 by virtue of any of the recognized modes available to it for acquiring property in Ohio. Its sole right to operate over Track 1619 stems from its trackage agreement with the Stock Yards, which agreement contains a limitation on the use of the track for livestock purposes which it was lawful for the Stock Yards, as the owner of Track 1619, to assert. Either the agreement is valid in its entirety and the railroad must use Track 1619 solely in accordance therewith, or the agreement is invalid and the railroad has no right whatever to operate upon the track. *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.*, 163 U. S. 564. Both the Commission and the courts have repeatedly held that, under similar trackage agreements, even those entirely between carriers, the parties have only limited rights thereunder, and are under no duty by virtue of the Interstate Commerce Act, or otherwise, to use the tracks in contravention of their agreements; such agreements do not disable contracting carriers from performing duties imposed upon them by law. *Alford* v. *Chicago, Rock Island and Pacific Ry. Co.*, 3 I.C.C. 519, 522; *Hocking Domestic Coal Co.* v. *K. & M. Ry. Co.*, 44 I.C.C. 392, 396 *et seq.*; *Chicago, M. & St. P., and P. R. Co. Trustees Operation*, 247 I.C.C. 1, 7; *Rock Island Ry.* v. *Rio Grande R.R.*, 143 U.S. 596, 609; *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.*, 163 U.S. 564, 583, 589, 603.

C. Swift & Company, for years, has reaped the

benefits of the trackage agreement betweeen the Stock Yards and the railroad company, and for that and other reasons, is in no position now to press for use of the track free from the contractual limitations to which it is subject.

The Stock Yards' track has not been dedicated to the public use under governing Ohio law pertaining either to (1) a statutory dedication (*The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, 8 Oh. St. 440, 444; *Wisby* v. *Bonte*, 19 Oh. St. 238, 245; *Penquite* v. *Lawrence*, 11 Oh. St. 274) or (2) a common law dedication (*The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, *supra*; *Morgan* v. *Railroad Co.*, 96 U.S. 716, 720 et seq.). The public has acquired no prescriptive right to use Track 1619. *Railroad Co.* v. *The Village of Roseville*, 76 Oh. St. 108.

D. Dedication of private property to public use may be made *cum onere*. *Lynchburg Traction and Light Co.* v. *Lynchburg*, 142 Va. 255; *Village of Bradley* v. *New York Central R.R. Co.*, 296 Ill. 383; 1 *Elliott on Roads and Streets* (2nd Ed.) Section 148. The public as the donee of property dedicated or devoted to its use may accept or not, but by unconditional acceptance thereby agrees to perform the conditions annexed to the gift. *Thompson on Real Property* (Permanent Edition, Revised and Enlarged) Section 490.

II

A. It is conceded that the Stock Yards is not a "common carrier," nor is it engaged in "transportation" by "railroad" within the meaning of the Interstate Commerce Act by virtue of its ownership of Track 1619.

The Interstate Commerce Act does not authorize the Commission's order against the Stock Yards: The Interstate Commerce Act, neither expressly nor by implication, authorizes the Commission to issue an order against a non-carrier situated as is the Stock Yards herein. The definitions of the terms "common carrier," "railroad," and "transportation" in Section 1(3) of the Act are not self-empowering, but are merely preliminary to the grants of authority provided elsewhere in the statute. *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434; *Pennsylvania R. Co.* v. *P. U. Comm'n*, 298 U.S. 170, 174. *Cf. Black & White Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U.S. 518.

If the definitions in Section 1 in and of themselves provide the Commission with regulatory authority, it would not have been necessary for Congress, by special enactments for that purpose, to include express companies, pipe line companies, or sleeping car companies within the term "common carrier," nor would it have been necessary for the Congress, in order to enable the Commission to extend its regulatory authority over the compensation which rail carriers should pay for the use of privately owned cars, to include in the Transportation Act of 1940 an amendment to Section 1 (14) of the Act so as specifically to provide such authorization. *Refrigerator Car Mileage Allowances*, 232 I.C.C. 276, 278-9; *General American Tank Car Corp.* v. *Eldorado Terminal Co.*, 308 U.S. 422, 428-429.

Section 2 of the Elkins Act does not empower the Commission to issue the order in question: Section 2 of the Elkins Act merely authorizes the Commis-

sion or the courts, *in proceedings before them involving the practices condemned by the Elkins Act*, to make all persons participating in or affected by such practices parties to the proceedings and subject to appropriate orders and writs. This follows from a consideration of the provisions of Section 2 and related sections in the light of the language of the Elkins Act, of its legislative history, and of the evil against which it was directed. *Baltimore & Ohio Ry.* v. *United States*, 277 U.S. 291, 299-300; *Twelfth Annual Report of the Interstate Commerce Commission* (1898), pp. 5 *et seq.*; *Fifteenth Annual Report of th Interstate Commerce Commission* (1901), pp. 5-16; *Seventeenth Annual Report of the Interstate Commerce Commission* (1903), pp. 5-10; *House Report No. 3765*, 57th Cong., 2nd Sess., Feb. 12, 1903. (To accompany S. 7053), pp. 5-6, 36 *Cong. Rec.* 2151-2159. Wherever the Commission's jurisdiction has attached over a non-carrier in cases involving Section 2 of the Elkins Act, the case has involved *a rate concession or advantage to a favored shipper.* The Commission's authority to invoke Section 2 of the Elkins Act to other types of situations has never received judicial approval. *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434, 445. The case at hand does *not* involve a rate concession or advantage to a favored shipper.

B. The authority of the Commission with respect to trackage agreements even between carriers is strictly limited by the provisions of the Act. Compare Section 1 (18) with Section 5 (2) of the Act. *Chicago, M., St. P. & P. R. Company Trustees Operation*, 247 I.C.C. 1, 7; *Thompson* v. *Texas-Mexi-*

can R. Co., 328 U.S. 134, 146. No provision will be found in the Act which gives the Commission any authority with respect to trackage agreements made by carriers with non-carriers for the right to use tracks owned by the non-carriers for special purposes. The settled course of both administrative and judicial decisions supports the validity of trackage agreements similar to the one in the case at bar and refutes the contention that such agreements disable carriers from performing their lawful duties. *Rock Island Ry.* v. *Rio Grande R.R., supra; Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co., supra; K. & M. Ry. Co.* v. *Public Utilities Comm'n of Ohio*, 96 Oh. St. 414, 426; *Sholl Brothers* v. *Peoria and Pekin Ry. Co.*, 276 Ill. 267, 271, 274; *Alabama Central R.R. Co.* v. *Alabama Public Service Comm'n*, 200 Ala. 536, 537; *Alford* v. *Chicago, Rock Island and Pacific Ry. Co., supra; Hocking Domestic Coal Co.* v. *K. & M. Ry. Co., supra*.

III

The Government's contention notwithstanding, the Commission's order is addressed to the Stock Yards and impairs the Stock Yards' property rights in Track 1619. It is physically impossible for the Stock Yards to comply with the Commission's order. It is legally impossible for the railroads to comply—to do so would subject them to liability for damages, to suits for injunctions, and to possessory actions. *Secombe* v. *Milwaukee, etc., R. Co.*, 23 Wall. 108; *Salt Lake City* v. *Hollister*, 118 U.S. 256; *Wagner* v. *Railway Co.*, 38 Oh. St. 32. The Commission itself has held that a carrier is not guilty of a violation of the Act in failing to

operate over industrial sidetracks where legal or physical obstructions prevent such operations, and that the Commission will not order such operation under these circumstances. *Limits Industrial Building Corp. et al.*, v. *B. & O. Co.*, 258 I.C.C. 438; 441; *Rex Jellico Coal Co. et al.*, v. *Louisville & Nashville Ry. Co.*, 237 I.C.C. 67, 70-71; *Certain-Teed Products Corp.* v. *C. R. I. & P. Ry. Co. et al.*, 68 I.C.C. 260, 262.

ARGUMENT

The fundamental error committed by the Commission in this case is that it undertook to strip the Stock Yards of its rights as owner of Track 1619 in excess of any authority conferred upon the Commission by the Interstate Commerce Act, as amended, and thus deprived the Stock Yards of its property without due process of law. The Commission has asserted its *regulatory* power, not only over common carriers subject to the Act, but also over a non-carrier upon whom the Act in no wise imposes any responsibilities under the circumstances here disclosed. It has claimed jurisdiction over the person of the non-carrier solely by virtue of the provisions of Section 2 of the Elkins Act (49 U.S.C. 42). In so doing, the Commission has misconceived the powers imposed upon it, has departed from its own prior conceptions of its powers, and has injected a new and revolutionary principle into our system of law.

No question is here presented of the jurisdiction of the Commission over the persons of the common carriers by rail who are appellees in this proceeding, although, quite aside from the question of its jurisdiction over such carriers, the Commission's

order was obviously invalid even as to them for the reason that such common carriers have been ordered to perform acts which it is legally impossible for them to do.

The appellants, throughout the proceedings before the Commission, before the court below, and in their briefs in this Court, have wholly misconceived the basic issue here presented by ignoring the elementary principle that the Commission derives no authority whatever with respect to common carriers or non-carriers by virtue of Section 1(3)(a) of the Act (49 U.S.C. 1(3)(a)). That section merely includes, by express reference, certain persons within the concept of "common carriers," and defines certain facilities included in the terms "railroad" and "transportation." The Commission's authority, if it exists at all, is contained elsewhere in the Act. In *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, at 443, this Court said:

> "* * * it is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carrier shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers contrary to the truth. * * *"

Appellants have further mistated the case as one involving the conclusiveness of the Commission's findings of fact. Appellants persist in ignoring the basic theory upon which this litigation was instituted and conducted, and as it was accepted and decided by the court below, namely: that the

Commission had no jurisdiction either over the person of the Stock Yards or over its legal right to control the use of its private property. That the doctrine of administrative finality of fact is inapplicable in the present posture of the case at bar, see Note 9, *supra*.

I

THE STOCK YARDS, AS OWNER OF TRACK 1619, HAS THE RIGHT TO LIMIT THE USE OF THE TRACK TO SUCH TRANSPORTATION THEREON AS DOES NOT INTERFERE WITH ITS OWN BUSINESS

The Commission's order (R. 65-66), if valid, deprives the Stock Yards of its rights as owner of Track 1619 in a manner not heretofore countenanced in the law and establishes a new mode of acquisition of property by common carriers for railroad purposes in addition to those modes heretofore recognized. The Commission ordered the Stock Yards, a non-carrier, and the common carriers by rail to do two things: (1) to cease and desist, and to abstain from refusing to deliver to the side track of Swift & Company, its shipments of livestock carried over the lines of the common carriers, and consigned to the plant of Swift & Company; and (2) to establish and put in force, and maintain in force thereafter, a schedule providing for the delivery to the side track of Swift & Company in Cleveland, Ohio, of its interstate shipments of livestock carried over the lines of the common carriers and consigned to Swift's plant at Cleveland.

It is plain that the order, in terms, is incapable of being performed by the Stock Yards, since the Stock Yards has never refused to deliver livestock to the side track of Swift & Company at its plant

in Cleveland, Ohio. It has never engaged in that kind of business. Equally difficult it would be for the Stock Yards to establish and maintain schedules providing for the delivery of livestock to the plant of Swift & Company, as it is not a common carrier by rail with the necessary facilities to maintain such schedules. The obvious intent of the Commission by issuing its order of May 3, 1946 (*the statements in the Government's brief to the contrary notwithstanding*), was to subordinate the rights of the Stock Yards as owner of its track to the use of the common carriers by rail for the benefit of Swift & Company and other shippers, in spite of the fact that no action has ever been taken by the Stock Yards or by the common carriers which deprives the Stock Yards of the right to limit the use of this track to such transportation thereon as does not interfere with its own business.

A. *The Stock Yards' ownership of Track 1619 is undisputed.*

The cavalier fashion in which the Commission summarily treated the property rights of the Stock Yards cannot be condoned by vague references to the National Transportation Policy declared by Congress (Act of September 18, 1940, 54 Stat. 898; quoted in Appendix A of the Government's brief). As this Court said in *Producers Transportation Co.* v. *Railroad Commission of California*, 251 U.S. 228, 230-231:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the pub-

> lic, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595; *Associated Oil Co.* v. *Railroad Commission*, 176 California 518, 523, 526. And see *Munn* v. *Illinois*, 94 U. S. 113, 126; *Louisville & Nashville R.R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483, 495; *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345, 357; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416, 419-420."

It is equally true that no order of the Interstate Commerce Commission can convert the private property of the Stock Yards into a public utility or make the Stock Yards subject to regulation by the Commission, for that, too, would be taking private property for public use without just compensation in violation of the due process clause of the Fifth Amendment to the federal Constitution.

Indeed, it comes as a surprise to learn in the Government's brief (p. 51) that the Government undertakes to castigate the court below for being "engrossed" with the property rights of the Stock Yards in the case at bar. There is of course no inconsistency between the preservation of private property rights and the fostering of a National Transportation Policy within the framework of the Constitution.

The vacillating arguments successively presented by the appellants in the case at bar in the various proceedings before the Commission, before the court below, and in their brief before this Court have been of such character as to show that, by now, the Government and Swift & Company are evidently fearful of the consequences which would ensue from adhering to the position originally asserted before the Commission to the effect that the track had been dedicated to a public use. That was the argument made before the Commission. Thus, counsel for Swift & Company asserted to the Commission at the time of the oral argument on June 4, 1943 (R. 473-474) as follows:

> "Mr. Rynder. I have some ideas upon that, Mr. Commissioner. I believe that that track has been dedicated to a public use for so many years that the stockyards *has lost the right to treat it as its own property.* That would be upon the theory of dedication.
>
> "I have searched those cases pretty well. I have mentioned some of them in my exceptions and one of them says distinctly that a dedication of property for station purposes for a certain period prevented that owner from taking back the property and selling it." (Emphasis supplied.)

Again, at the second oral argument before the Commission on October 3, 1945, counsel for Swift & Company, speaking on the same subject, had the following colloquy with members of the Commission (R. 514):

> "In other words, once that track has been put in the public service—and it has been

put into that service for something over 35 years and is still in the public service—it becomes a part of the railroad and must be operated by the railroad under all its obligations as a common carrier, both as to the duties required to be performed and as to the avoidance of discrimination or undue prejudice.

"Commr. Barnard. Without the railroad having any interest in it financially at all?

"Mr. Rynder. Oh, it has an interest in it financially. It enables it to serve seven industries which give it business.

"Commr. Barnard. I am not speaking of that kind of interest, I am speaking of ownership interest.

"Mr. Rynder. It has no ownership, no, but it is maintained and it has been maintained for 35 years.

"Commr. Barnard. You think that is a dedication under the lease arrangement made with the New York Central? Do you think that amounts to a dedication?

"Mr. Rynder. I hope to show you in one case it certainly has been so held."

Not only was the contention made to the Commission in oral argument on the two occasions above mentioned that Track 1619 had been *dedicated* to a public use, but Swift & Company made a principal point of this contention in its briefs before the Commission. At page 101 of its brief dated October 2, 1944, Swift & Company asserted that "The track and ground thereunder were unquestionably dedicated by the Stock Yards Company to a public service." In that brief, it also undertook to review the authorities relative to the doctrine of the "dedication of property to a public

use." And in its brief before this Court, Swift & Company glibly and irrationally says that the Stock Yards "appropriated Track 1619 to the use of New York Central." (Swift brief, p. 52.)

In the actions in the court below, all of the appellants herein took the position that Track 1619 had been devoted to a public use.[11] It appears that

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[11] Cases relied upon by appellants in the court below, as in this Court, to sustain their contention that Track 1619 was devoted to a public use, are not cases involving the law of dedication, but, on the contrary, are cases such as *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 238 U. S. 211, involving eminent domain proceedings by a railroad to take property for the building of a spur. In the *Union Lime Co.* case, the Court correctly held that such a taking was for a public purpose. See the discussion at 233 U. S. 221. This is, of course, a far cry from holding that the owner of the land over which the spur was laid had devoted it to a public use so as to justify its utilization without the necessity of taking appropriate condemnation proceedings. It is to be observed that in the *Union Lime Co.* case, the Court pointed out that, "* * * there is a clear distinction between spurs which are *owned* and operated by a common carrier as a part of its system and under its public obligation and merely private sidings." (Emphasis supplied.)

The appellants have also relied at one time or another upon *Alton R. R. Co.* v. *Illinois Commerce Commission et al.*, 305 U. S. 548, to show that Track 1619 has been devoted to a public use. This, also, is not a dedication case. The Court merely held there that the Illinois Commerce Commission had the right to refuse to permit the railroad to abandon an industrial side track which had been constructed in part across the public streets and private lands for the *general* use of the public so as to serve various industries.

Examination of the authorities relied upon by appellants will disclose that, in no instance, have they cited any

now, in its brief filed in the case at bar, the Government disclaims any knowledge of whether Track 1619 was ever dedicated to a public use, conceding that this is "a question of Ohio real property law" (Government's brief, page 19). Instead, the Government apparently falls back for its chief reliance to sustain the action of the Commission upon the pervasive error made by all of the appellants throughout these proceedings and by the Commission to the effect that, by the magic of Section 1(3)(a) of the Interstate Commerce Act and because of the contract respecting its limited use between the Stock Yards and one of the common carriers by rail herein, Track 1619 has become a part of the New York Central's railroad system so as to justify an order of the Commission striking down the rights of the Stock Yards as the owner of that track.

It seems to be conceded now that the track is owned by the Stock Yards. At all events, the Gov-

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decision of this Court or of any other court in which the exact issue here involved was considered, but, on the contrary, have relied upon cases of the character mentioned, including, besides those already indicated, *Hairston* v. *Danville and Western Ry.*, 208 U. S. 598, 608 (condemnation); *Milheim* v. *Moffett Tunnel District*, 262 U. S. 710 (taxation); *F. C. Ayres Mercantile Co.* v. *Union Pacific Ry.*, 16 F. (2d) 395 (easement by prescription), and *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467. See, also, notes 25 and 31, *infra*. In thus tearing away discussions by this Court from their contexts and attempting to apply them to issues with which the Court was not concerned, the appellants and the Commission have fallen into error against which this Court has frequently and recently warned. *Atlantic Coast Line R. R.* v. *Phillips*, 332 U. S. 168.

ernment apparently takes the position that ownership is immaterial for purposes of present decision —a position which Swift & Company hesitates to adopt. (Swift brief, pp. 27, 45.) The rationale of this position is obscure. If, as is apparently conceded, the Stock Yards is the owner of Track 1619, it has a clear right to use it or to limit its use by others so as not to interfere with its own business.

In this connection, it must not be forgotten that the Stock Yards is performing an important function and service to the shipping community interested in the movement of livestock. It is subject to the regulatory jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*), insofar as its stockyards operations are concerned. The rates which the Stock Yards charges to patrons for the use of its facilities are fixed by the Secretary upon the basis of a valuation of the properties of the Stock Yards and are designed to secure to it a specified return thereon. The Stock Yards is thus under a duty to the farmers and other patrons who utilize its facilities to see that its physical assets and financial resources are maintained; and it is under a like duty to such patrons to maintain the integrity and continuity of its business. To compel the Stock Yards to permit the use of its sidetrack and the land occupied thereby for delivery of livestock to Swift & Company would amount to taking a strip of very valuable land fronting on West 65th Street, without just compensation and without due process of law. The compelled use of the Stock Yards' track and property would, moreover, deprive it of revenue.

The Stock Yards is engaged in the business of handling, storing and delivering livestock, including livestock consigned direct to Swift & Company and other packers, in connection with which it has provided and maintains pens, alleys, railroad sidetracks, and other necessary facilities, and for the use of which it derives revenue based upon rates approved by the Secretary of Agriculture or upon agreements covering non-stockyard services. As a public stockyard it must provide facilities to accommodate all reasonable peaks of volume of livestock received from the railroad company for delivery to packers through its stockyards. If livestock should be diverted from the pens of the Stock Yards for delivery by the use of its sidetrack, the Stock Yards would then be deprived of compensation for the pen facilities, which would as a consequence remain idle. The Stock Yards could not long remain in business under such circumstances.

The case at bar presents a novel situation in which a great public service organization is ordered, without authority in law, to permit its property to be used so as to cause its business to dwindle away, thereby rendering it less efficient, and ultimately unable to perform its stockyards services for its livestock market patrons.

The invalidity of the Commission's order fundamentally stems from the fact that, without any lawful basis of regulatory authority over the Stock Yards under the circumstances here disclosed, the Commission has ordered the Stock Yards to give up its property for the benefit either of the common carriers by rail or Swift & Company, depending upon the point of view one takes, without such

property having been purchased or acquired by condemnation proceedings, which are the only lawful methods available for the taking of such property.[12]

If, as held by the Commission (R. 38), and as contended by the appellants, the track has become part of the system of the New York Central Railroad Company so that the Stock Yards may no longer exercise the usual control of an owner with respect to his property, such result must have been accomplished by virtue of some action heretofore taken by the Stock Yards with respect to this property. The record fails utterly, however, to show any such action on the part of the Stock Yards.

B. *The Stock Yards has in no manner surrendered to the railroad its right to control the use of Track 1619.*

The record shows that Track 1619 was built upon lands of the Stock Yards by virtue of an agreement made between the Stock Yards and the Big Four in 1899. The Stock Yards bore the cost of constructing this track. It was at that time and has ever since remained the absolute owner thereof and of the land upon which it is located (R. 347-349). The parties to the 1899 agreement confirmed this agreement, if any confirmation were necessary, when, a quarter of a century later, they

[12] The Stock Yards does not even concede that its Track 1619 could be taken from it by eminent domain proceedings, the Government's statement to the contrary notwithstanding. The Stock Yards' position is simply that, if its track may be taken away from it at all, the prescribed procedure must be by way of appropriation proceedings.

entered into the agreement of June 16, 1924 (R. 339-341), which superseded the 1899 agreement. It was there confirmed (R. 340) that

> "The Industry does and shall continue to own the following tracks or portions thereof:
>
> "(a) The about 1,619 feet of Track No. 245 extending from the Railroad right of way southwardly to the point of Big Four ownership in said track."

As amended effective February 1, 1935 (R. 339) the common carrier was accorded the "free and uninterrupted use, except for competitive traffic a charge for which use shall be the subject of a separate agreement," of Track 1619 located on the land of the Stock Yards Company. Thus the Stock Yards, as recognized by the court below (R. 150 *et seq.*), has been careful throughout the years to preserve its ownership and control over its track. It is clear that under the governing law no property interest in the track in question passed to the railroad carrier so as to preclude the Stock Yards from exercising full control over its track by excluding therefrom any and all user by the railroad or by Swift & Company.[18]

As conceded by the appellants in their brief (see Government's brief, page 19), since this track is located wholly within the State of Ohio, it is pertinent to look to the Ohio law to determine whether

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[18] The Commission itself evidently was of the opinion that the Stock Yards had the right to altogether withdraw the use of its track by anyone (R. 38; R. 40). See also the opinions of the dissenting Commissioners (R. 45; R. 39).

any property interest in such track has ever passed so as to preclude the Stock Yards from exercising the usual powers incident to ownership.[14] In Ohio, a railroad can acquire property in only three ways: by gift, by conveyance, or by appropriation in accordance with statute. *Todd* v. *Pittsburg*, 19 Oh. St. 514.[15]

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[14] The law of Ohio upon this subject, as construed by its courts, is governing here. *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 68 S. Ct. 167, 169. See also *Louisiana ex. rel. Francis* v. *Resweber*, 329 U. S. 459; *Huddleston v. Dwyer*, 322 U. S. 232; *Minnesota* v. *Probate Court*, 309 U. S. 270; *Morehead* v. *New York ex. rel. Tipaldo*, 298 U. S. 587; *Wilson* v. *North Carolina*, 169 U. S. 586.

[15] Section 8761, Page's *Ohio General Code* (Annotated), provides that both domestic and foreign railroads may acquire lands by *purchase* or *gift* necessary to secure rights of way. Also, Ohio has provided a complete and comprehensive procedure to be followed by corporations authorized to *appropriate private property*. Sections 11038 *et seq.* of Page's *Ohio General Code* (Annotated). The right to appropriate private property in accordance with such procedure has been conferred upon railroad corporations in Ohio, whether such railroad corporations are foreign or domestic companies (Sections 8754, 8759, 8760, 8763, 8764, and 8767 of Page's *Ohio General Code* (Annotated)). Under the procedure provided by Sections 11038 *et seq.*, *supra*, appropriations are only authorized when the corporation is unable to agree with the owner as to the compensation to be paid for the property or easement or interest therein sought to be appropriated or when the owner is unknown (Section 11039). The procedure calls for the institution of proceedings by the filing of a petition in specified Ohio courts (Section 11042). The court is authorized to make certain preliminary determinations as to the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation (Section 11046). Provision is also made for a jury trial (Sections 11047 and 11048). Other provisions deal with other incidents to the procedure.

The methods provided are the exclusive methods in Ohio by which railroad corporations, whether domestic or foreign, may obtain property for railroad purposes.[16]

In the case at bar, the railroad has never taken any statutory proceedings in Ohio to appropriate Track 1619 so as to acquire an interest therein by virtue of this method. Furthermore, it is settled in Ohio that a railroad corporation cannot acquire property by way of dedication. In *Todd* v. *Pittsburg*, 19 Oh. St. 514, the Supreme Court of Ohio said, at page 524:

> "* * * A dedication is an appropriation of lands to a *public* use. In such case the direct beneficiary is the public. Wherever the legal title may be vested, the right to the use is in the public. But the defendant here is a private corporation. Its road, its rights of way, its depots, its offices, its rolling stock, etc., are all, not public, but private property. They are owned by the defendant. But among the various methods by which private property may be acquired, *dedication* is not one. * * *" (Emphasis supplied.)

It is thus perfectly clear that the New York Central has no title to or interest in Track 1619 by virtue of any of the recognized modes available to it for acquiring property in the State of Ohio. Its sole right to operate over Track 1619 stems

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[16] *Wagner* v. *Railway Co.*, 38 Oh. St. 32; *Henry* v. *The Columbus Depot Co.*, 135 Oh. St. 311; *Cincinnati* v. *Railroad Co.*, 88 Oh. St. 283; *Powers* v. *Railway Co.*, 33 Oh. St. 429; *Toledo & Wabash Ry. Co.* v. *Daniels et al.*, 16 Oh. St. 390.

from its contract with the Stock Yards,[17] and that right contains a limitation on the use of the track for livestock purposes which it was lawful for the Stock Yards, as the owner of Track 1619, to impose.

It is no answer to this to say, as do the appellants in the case at bar, that the restricted use which the Stock Yards permitted to be made of its property is void as against public policy in that it disables the common carriers from performing duties imposed upon them by law. Indeed, this seems to be the heart of the argument made by the appellants, as they have abandoned all prior attempts to show that there has been a dedication of the property in question to a public use. But the fallacy with this reasoning lies in the circumstance that if, assuming, *arguendo*, such limitation is void, then the common carriers have no right at all to operate

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[17] No authority has, of course, been conferred upon the Interstate Commerce Commission to exercise, on behalf of the Federal Government, any power of eminent domain in a situation such as that presented in the case at bar, even assuming that Congress has the power to exercise the power of eminent domain in such a situation. In proper cases, in connection with the execution of powers conferred upon it by the Constitution, the Congress has exercised this power. *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 568; *Shoemaker* v. *United States*, 147 U. S. 282. Even where the Congress has thought it necessary to authorize the Commission to order the use by one carrier of the terminal facilities of another carrier, it has enacted specific legislation to this end and provided a careful procedure to be followed in connection therewith. See Section 3(5) of the Act empowering the Commission to require a common carrier by rail owning terminal facilities to permit the use of such facilities by another carrier upon the fixing of compensation therefor by the Commission in the absence of an agreement by the carriers.

over Track 1619 for any purpose. Thus, since the railroad's right to enter upon the lands of the Stock Yards and to use its track rests solely upon the limited use accorded to it by the trackage agreement—an arrangement which Swift & Company has long recognized as beneficial to it—either that contract is valid in its entirety and the railroad must use Track 1619 solely in accordance with the contract, or the contract is invalid and the railroad has no right whatever to operate upon the track. As this Court said in *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.*, 163 U.S. 564, at page 583, when considering a similar trackage agreement to the one here involved, except that it was between two carriers, where the owning carrier had limited the use which it permitted the other carrier to make of its property:

> "* * * And throughout the whole contract there does not appear to be a single provision which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company. The contract in this regard was really an agreement for trackage rights, for running arrangements, a 'terminal contract' with compensation on a 'mileage' or 'wheelage basis,' rather than a lease."

The contention that the trackage agreement disables the common carrier from performing duties imposed upon it by law is also based upon a fallacy, immediately apparent, in that it assumes a duty upon the part of the carrier to operate over Track 1619 in violation of its agreement. It would ap-

pear to be elementary that, if the carrier does not control the full use of Track 1619, it cannot be required to operate over it in a manner consistent only with such full right of user. Both the Commission and the courts have repeatedly held that, under these trackage agreements, the carriers, having only limited rights thereunder, are under no duty by virtue of the Interstate Commerce Act, or otherwise, to use such track in contravention of their agreements and that such agreements do not disable the carriers from performing duties imposed upon them by law.[18]

C. *The Stock Yards has not in any manner surrendered its control over Track 1619 to the public, including Swift & Company.*

Not only does the record show that the Stock Yards has retained the right, as against the New York Central Railroad, to control the use of its track, but also that the Stock Yards has not dedicated or otherwise devoted its Track 1619 to the public, including Swift & Company, so as to preclude it from exercising full control over its property in accordance with its own business interests.

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[18] *Rock Island Ry.* v. *Rio Grande R. R.*, 143 U. S. 596, 609, 612; *Union Pacific Ry.* v. *Chicago, etc. Ry.* 163 U. S. 564, 581, 593, 589, 594, 603; *K. & M. Ry.* v. *The Public Utilities Commission of Ohio*, 96 Oh. St. 414; *Sholl Brothers* v. *The Peoria and Pekin Ry.*, 276 Ill. 267, 271, 273, 274-276; *Alabama Central R. R.* v. *Alabama Public Service Commission*, 200 Ala. 536, 537, 538; *Bedford-Bowling Green Stone Co.* v. *Oman*, 134 Fed. 441; *Alford* v. *Chicago, Rock Island and Pacific Ry.*, 3 I. C. C. 519, 522, 526-529; *Hocking Domestic Coal Co.* v. *K. & M. Ry.*, 44 I. C. C. 392, 396 *et seq.*, *Chicago, M., St. P., and P. R. Co. Trustees Operation*, 247 I. C. C. 1, 7; *Texas and N. O. R. Co. Operation*, 249 I. C. C. 595; *Abandonment by Chicago, R. I. & Pacific Ry.*, 131 I. C. C. 421.

One is met at the threshhold of this case with the fact that Swift & Company which, for years, has directly reaped the benefits of the trackage agreement between the Stock Yards and the railroad company, is now urging that the contract is illegal as opposed to public policy because the use permitted by the Stock Yards and enjoyed by Swift & Company is not all the use that Swift & Company would now like to have for its present business purposes. Swift & Company and the other appellants now attempt to make it appear that the restriction on the use of Track 1619 for the movement of livestock, except upon the terms proposed by the Stock Yards, is something new. The record shows, without contradiction, that Swift & Company has always, with the exception presently to be noted, received direct shipments of livestock through the Stock Yards. This was the condition prevailing and understood in 1910 at the time the private sidetrack of Swift & Company was built.

Throughout the years that followed, the practice of taking direct shipments of livestock through the Stock Yards prevailed and has continued since to be the rule. As long as direct shipments of livestock were taken from the Yards, the Stock Yards had no occasion to take any positive steps to preserve its business interests. Until 1930, the use made of Track 1619 was a limited use made by the railroad common carrier pursuant to its trackage agreement with the Stock Yards. Swift & Company, in that year, began to cause to be moved substantial volumes of livestock over Track 1619, thus bringing about a change in the conditions.

The upsetting of these conditions by Swift &

Company resulted in the amendment effective February 1, 1935, to the June 16, 1924, agreement, by which the Stock Yards, in effect, told the railroads that if Track 1619 was to be used for the movement of livestock—a use to which it has never been put prior to the action of Swift & Company between 1930 and 1935—a separate agreement would have to be made providing for adequate compensation to the Stock Yards for such new type of use of its track. Under these circumstances, how can it be said that the Stock Yards has ever, in any manner, surrendered its control over Track 1619 to the public, including Swift & Company, so as to make it *unlawful* for it to use its property to foster its own business or to give the Commission any jurisdiction over it?

If the public has such interest in this track as to preclude the Stock Yards from exercising its powers of ownership, it must be because the Stock Yards has dedicated it to the public use either by statutory or common law dedication.

In view of the decisions of this Court, of the Supreme Court of Ohio, and of authorities elsewhere,[19] it cannot be seriously contended that Track 1619 of the Stock Yards has ever been dedicated or devoted to the public use.

Examination of the Ohio cases cited in the last

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[19] *City of Cincinnati* v. *The Lessee of White*, 6 Peters 431, 438, 440; *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720, 722; *The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, 8 Oh. St. 440, 444, 445, 446; *Railroad Co.* v. *The Village of Roseville*, 76 Oh. St. 108, 115, 117; *Wisby* v. *Bonte*, 19 Oh. St., 238, 245; *Todd* v. *Pittsburg*, 19 Oh. St. 514, 523; *Penquite* v. *Lawrence*, 11 Oh. St. 274, 276; *Thompson On Real Property* (permanent edition, revised and enlarged), Sec. 481, 482-483, 486, 487, 490.

footnote reveals that courts of that state, in line with the authorities elsewhere, have held that it is the established law in Ohio that dedication is the appropriation or gift of land to some public use made by the owner of the fee and accepted for such use by or on behalf of the public and that, in Ohio, there are two classes of dedication:

(1) Property may be passed by virtue of *statutory dedication* which must be made in compliance with statutory authority and requires no acceptance or assent on the part of the public except such as is provided by statute. *The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, 8 Oh. St. 440, 444; *Wisby* v. *Bonte*, 19 Oh. St. 238, 245; *Penquite* v. *Lawrence*, 11 Oh. St. 274. In Ohio, the statutes provide for such a method of statutory dedication, for example, with respect to public streets and alleys. Page's *Ohio General Code* (Annotated), Sec. 6886. The courts of Ohio, however, have held that the statutory scheme must be followed in order to sustain statutory dedication. *Penquite* v. *Lawrence*, 11 Oh. St. 274, 276. The record in the case at bar does not, of course, show that the Stock Yards has ever made a statutory dedication of Track 1619 to the public in accordance with the law of Ohio.

(2) The Ohio courts, on the other hand, have held that property may pass to the public by a *common law dedication* which, as stated by the Supreme Court of Ohio in numerous decisions, is one made without compliance with statutory requirements and constitutes an offer on the part of the owner of real property to dedicate it to the pub-

lic use, followed by an acceptance of such offer by the public.[20]

The elements of a valid common law dedication are lacking in the case at bar for many reasons. The careful retention of control by the Stock Yards of its track throughout the years, by which it has been kept free from the movement of livestock, conclusively dispells any notion that the Stock Yards has ever manifested any intention to permit the free public user of its track.

In view of this elemental circumstance, it is difficult to see by what process of reasoning the Commission concluded (R. 38) that, by its trackage agreement with the New York Central Railroad Company, the Stock Yards was contracting for the public to use its track without restriction.

From the standpoint of Ohio law relative to dedication, there has also never been any acceptance by the general public of this particular track, so that this element, too, of a valid common law dedication in that jurisdiction is lacking. Mere permissive use of the track does not show either intention or acceptance in the sense in which such term is used in the authorities dealing with dedication. *Railroad Co.* v. *The Village of Roseville*, 76 Oh. St. 108, 115, 116, 117, 118; *Thompson on Real Property*

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[20] There is no contention by the appellants in the case at bar, as the Stock Yards understands it, that the public has ever obtained a right to use Track 1619 by prescription under the Ohio law. The Supreme Court of Ohio has pointed out that title by public prescription in Ohio can only be shown by *adverse* user by the public, under a *claim of right*, and unopposed for a period of twenty-one years. *Railroad Company* v. *The Village of Roseville*, 76, Oh. St. 108.

(Permanent Edition revised and enlarged), Sec. 487.

The Supreme Court of Ohio and this Court, as well as the authorities elsewhere, have uniformly held that a common law dedication really acts by way of estoppel on the owner and prevents the owner from asserting his rights because of equitable considerations.[21] It becomes pertinent, therefore, to determine whether there is any element of estoppel in the case at bar so as to prevent the Stock Yards from asserting full control as owner.

Swift & Company has attempted to make it appear throughout this proceeding that the Stock Yards, by its action late in 1934, disrupted a long-continued practice of moving livestock over this track to Swift & Company's siding. The truth in this connection is otherwise. Swift & Company, together with the other packers having sidetrack connections dependent upon Track 1619, have continuously received their direct shipments of livestock through the facilities of the Stock Yards. To guard against such a contingency as actually occurred, the Stock Yards had always retained the contract right to cancel this contract for the use

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[21] "* * * a dedication of ground to public uses at common law acts by way of estoppel *in pais* of the owner, rather than as a *grant* or the transfer of an interest in the land. *City of Cincinnati* v. *White*, 6 Pet. S. C. Rep. 582; *Town of Paulet* v. *Clark*, 9 Cranch 202; *Hunter* v. *Trustees of Sandy Hill*, 6 Hill 407; *Curtis* v. *Keesler*, 14 Barb. 521." (*The Lessee of the Incorporated Village of Fulton* v. *Mehrenfeld*, 8 Oh. St. 440, 444). This Court has also held that common law dedication acts by way of estoppel on the owner, rather than as an actual conveyance of a property interest or an easement to the public by way of grant, differing, in this respect, from statutory dedication. *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720 *et seq.*

of its Track 1619. When, therefore, between 1930 and 1935, Swift & Company attempted to disrupt a long-settled custom in that area in receiving direct shipments of livestock through the yards, the Stock Yards merely exercised its lawful right, which it had constantly reserved for precisely such a contingency as this,[22] when, on December 31, 1934 (R. 423) the Stock Yards informed the New York Central Railroad Company that it would cancel the agreement. Thereafter, as a matter of accommodation to the other industries in the stock yards district, the Stock Yards Company permitted

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[22] Reference to the agreement of June 16, 1924 (Ex. 9, R. 339), shows that the Stock Yards had the right to terminate such an agreement upon thirty days' notice. By such agreement, it also permitted the Railroad to use Track 1619 but, in this connection, it must be remembered that such track *was not being used* for the delivery of livestock to Swift and Company or to anyone else, nor had it been so used since the inception of the track arrangements in 1910. When, therefore, as a result of Swift's action between 1930 and 1935, its own property was used to its detriment, the Stock Yards merely exercised the right which it had reserved in the agreement of June 16, 1924, to cancel the entire use of the track. The Commission, in the case at bar, indicated in two places that it was not prepared to say that the exercise of such right was unlawful (R. 38, R. 40). The amendment effective February 1, 1935 (Ex. 9, R. 339), in effect, permitted the continued use of the track, except for livestock which could only be moved over the track if a separate agreement as to the charge between the Stock Yards and the carrier was made. The real effect of this agreement was to change nothing which had theretofore taken place. *E contrario*, the effect of the arrangement was to preserve the *status quo* which Swift & Company was attempting to upset. In this posture of the case, the proceeding by Swift and Company presents the novel situation in which the company is attempting to claim rights under the Interstate Commerce Act, as amended, upon the basis of an alleged change in a custom which never existed.

the agreement to continue with respect to the movement of commodities other than livestock, but persisted in asserting its lawful right to confine the use of the track to non-competitive traffic. (Ex. 48, R. 437 *et seq.*) The New York Central Railroad Company thus obtained continued use of the track upon the best terms which it was possible to obtain from the Stock Yards. It thus clearly appears that Swift & Company, as well as the other packers having sidetrack connections dependent upon Track 1619, were directly benefited by the arrangement made by the railroad company with the Stock Yards. *That arrangement, in effect, merely continued for the future what had been the practice in the past with respect to the use of that track before Swift & Company unsuccessfully sought to upset that practice.*

The facts show nothing inequitable in the existing arrangement but, on the contrary, they conclusively demonstrate that Swift & Company has invoked the jurisdiction of the Commission in this instance to establish its statutory right to something which never existed.

It is apparent, therefore, that Track 1619 has not been dedicated to the public use by either a statutory or common law mode of dedication.

D. *The Stock Yards, as owner of Track 1619, is entitled to condition its use.*

Even if the elements requisite to a common law dedication had been established by the facts of record, the Commission would not have been at liberty to ignore the condition accompanying such dedication. The public could not, in any event,

dictate the terms of the grant to it. It would have to accept its burdens along with the benefits. It is well established that a dedication of private property to public use may be made *cum onere*. *Lynchburg Traction & Light Co.* v. *Lynchburg*, 142 Va. 255; *State* v. *Hoboken*, 59 N. J. Law 383; *Village of Bradley* v. *New York Central Railroad Company*, 296 Ill. 383; *City of Noblesville* v. *Lake Erie and W. R. Co.*, 130 Ind. 1; *Arn* v. *Chesapeake & O. Ry. Co.*, 171 Ky. 157; *Oklahoma, etc., R. Co.* v. *Dunham*, 39 Tex. Civ. App. 575; 1 *Elliott On Roads and Streets* (2nd Ed.), Sec. 148. These authorities clearly show that the owner may grant whatever estate he sees fit and may annex conditions and limitations to his grant at his pleasure, provided such limitations and conditions are not inconsistent with the dedication and will not defeat the operation of the grant. Subject to this limitation, the dedication must be accepted "secundum forum doni." Universal recognition of this salutary principle has been attained since to hold otherwise would be, in effect, to compel the owner to part with his property on terms different from those prescribed in his grant.[23]

In the case at bar, it cannot be said that there would be any inconsistency in granting to the public the privilege of user of the track for certain purposes and, at the same time, preserving the

[23] Viewed from another aspect, the result is the same. Thus, where property is dedicated for a certain purpose, it must be used solely for the purpose for which it is dedicated. *Jones Island Realty Inc.* v. *Middendorf*, 191 La. 456, 461. Furthermore, the same principle holds good with respect to the establishment of prescriptive rights, for a prescriptive right may be acquired in a conditioned use. *Faulkner* v. *Hook*, 300 Mo. 135.

rights of the donor with respect to the limitation of its use for other and unrelated purposes in order to effectuate the business purposes of the donor.

It is clear, therefore, that, if the case at bar were viewed, *arguendo*, as one of dedication or devotion of the track to public use, the public would have to accept that which had been dedicated or devoted and would have no lawful right to demand more. The donee cannot dictate the terms of the gift; it may accept or not, but by unconditional acceptance the donee thereby agrees to perform the conditions annexed to the gift. *Thompson on Real Property* (permanent edition, revised and enlarged), Sec. 490.

If the Commission and the appellants were otherwise correct in their position with respect to the devotion of Track 1619 to public use (which, of course, they are not), acceptance of the principle proposed by them would establish a novel and unprecedented rule of law by which the owner of property would be unable to give away or to sell a part of that property and retain a part. Yet, this is the inevitable result of the principle proposed by the appellants. By ignoring the limitations or conditions which were placed on the use of Track 1619 by its lawful owner, the appellants have escaped coming to grips with the pervading error in their reasoning.

The record in the case at bar is barren of any fact which would show or tend to show that the Stock Yards has ever done anything or has ever acquiesced in anything which would limit its right to restrict the use of Track 1619 to such transpor-

tation thereon as does not interfere with its own business. The Commission, in its report of May 3, 1946 (R. 28), does not point to any factual circumstance which would restrict the right of the Stock Yards to exercise the normal power of the owner of property, nor do the appellants point to any such fact in their briefs. On the contrary, the sole reliance of the appellants in the case at bar is based upon erroneous views as to the authority of the Commission under the circumstances here disclosed.

II

THE COMMISSION IS NOT EMPOWERED TO LIMIT THE STOCK YARDS' CONTROL OVER USE OF TRACK 1619

A. *The Stock Yards is not subject to the regulatory authority of the Commission.*

The mere ownership of Track 1619 by the Stock Yards does not render it subject to the jurisdiction of the Commission so as to authorize that body to issue against the Stock Yards the order of May 3, 1946 (R. 65-66); nor does the contractual relation between the Stock Yards and the New York Central Railroad subject the former to regulation by the Commission. Quite aside from the fact that it is obviously impossible for the Stock Yards to comply with the terms of the order, it is conceded by the Government that the Stock Yards is not a "common carrier." Nor is it engaged in "transportation" by "railroad" within the meaning of the Interstate Commerce Act by virtue of ownership of Track 1619. Industrial sidetracks of the character of the one under consideration are commonly owned by private industries throughout the nation, and such ownership has never been

considered as rendering the owner of such facilities subject to the jurisdiction of the Interstate Commerce Commission.

The Interstate Commerce Act does not authorize the Commission's order against the Stock Yards: Nothing is gained by pointing, as do the appellants, to the definitions contained in Section 1(3)(a) of the Act, yet the appellants' argument is based on these definitions. Their argument has thus proceeded upon a subtle transference of concepts used in the Interstate Commerce Act from the objects to which these concepts properly pertain—the common carriers—to the Stock Yards, to which they do not apply at all.[24] The argument runs that, because "railroad" and "transportation" include not only facilities that are owned by a common carrier but also those which are the subject of

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[24] The distinction between a common carrier by railroad subject to the Act and a corporation performing the functions of the Stock Yards is clear. It was aptly stated by this Court long ago in *Gracie* v. *Palmer*, 8 Wheat. 605, 632, by Mr. Justice Johnson that:

> "The carrier may hire his vehicle, or his team, or his servant, for the purposes of transportation; or he may undertake to employ them himself in the act of transporting the goods of another. It is in the latter case only, that he assumes the liabilities, and acquires the rights of a common carrier. So, the shipowner, who lets his ship to hire to another, whether manned and equipped or not, enters into a contract totally distinct from that of him who engages to employ her himself in the transportation of the goods of another. In the former case, he parts with the possession to another, and that other becomes the carrier; in the latter, he retains the possession of the ship, although the hold may be the property of the charterer; and being subject to the liabilities, he retains the rights incident to the character of a common carrier."

a contractual arrangement between the common carrier and a third party, the duty of the carrier with respect to its operation over such contracted facilities is co-extensive with its duties in respect to facilities owned outright and fully controlled by it. Having by this argument created a "duty" on the part of the common carrier with respect to contracted facilities (by ignoring the terms of the contract), the appellants take the further step and argue that the carrier cannot enter into a contract to disable itself from performing such duty. The last argument is based upon a universally accepted rule of law,[25] but it

[25] See note 31, *infra*. *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, relied upon by the Government in its brief, has no applicability to the case at bar. In the *Mottley* case, the Court merely applied the familiar rule that a contract, valid when made, becomes unenforceable by virtue of a subsequent change in law rendering it unlawful to carry out the contract in the manner specified by its terms. As recognized at pages 41-42 of the Government's brief, the railroad in that case had contracted in 1871 to issue the Mottleys free passes for life, but later the Hepburn Act specifically forbade the further issuance of such passes (See section 1 (7) of the Act) and prohibited rate advantages different from published tariffs. Clearly, therefore, after the passage of the Hepburn Act it would have been illegal to continue to perform the Mottley contract both because of the specific prohibition as to passes and the prohibition respecting departure from tariffs. In the case at bar, however, no provision of law makes it illegal for a common carrier to enter into a contract for trackage rights such as that here involved. See authorities cited in note 18, *supra*, and discussed in text, *infra*. pp. 77-98. For similar reasons, the authorities cited on pp. 40-41 of the Government's brief are irrelevant; the principle for which they stand is inapplicable where the exercise of Governmental functions are not thwarted by contractual arrangements. In the case at bar, not only has the Congress failed to confer upon the Commission the authority to regulate non-carriers, such as the Stock Yards, but also the appellants have

only has applicability in a particular case where the carrier has, in fact, disabled itself from performing a duty. To the extent, however, that the use of contracted facilities of a common carrier is a restricted use, to that extent the common carrier has no power and, hence, no duty, to utilize the property in a manner expressly prohibited by the owner. The Commission itself in *Alford* v. *The Chicago, R. I. & Pacific Ry. Co.*, 3 I.C.C. 519, 532, rejected an argument identical with that advanced by appellants in the case at bar. In upholding the validity of a trackage agreement between two carriers, limiting the use which one of the carriers could make of the line, the Commission said that:

> "The duties of a common carrier are bounded by its rights and powers. Where there is no right or power to render a particular service there can be no duty in that respect. And there can not be unjust discrimination, nor undue preference or prejudice, in refusing a service that it has no right by statute or contract to perform.
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> * * *
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> "The respondent, under existing arrangements, has no authority to do other-

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wholly failed to show that the common carrier appellees were under a duty as to which they disabled themselves by the contractual arrangement in question. In any event, considerations such as those advanced by appellants do not furnish a basis for the order against the Stock Yards, since, if it be assumed, *arguendo*, that the trackage agreement is void either (1) because it, in some way, obstructed the assertion of a Governmental function or (2) because it disabled the carriers from performing a duty, then the legal result is that the carriers have *no right at all* to use the track (see authorities cited in note 18, *supra*), not that the Commission may assert jurisdiction over the person of the Stock Yards.

wise. The offences charged against it must be predicated of something done for others under similar conditions that is not done for the complaining party. There is nothing done for any one located on the line used under the contract that is not done for complainant. The whole force of complainant's contention is that more facilities would be afforded if respondent rendered the service in question. Conceding this to be true, the respondent explains by showing that it has no power to do so, and this answers the charge."

Congress, in defining the terms "common carrier," "railroad," and "transportation," in Section 1 of the Act, has merely said that a "common carrier" includes certain companies (pipeline companies, express companies, sleeping car companies, and persons engaged in transportation as common carriers for hire (Section 1(3)(a)). The term "transportation," for example, is employed throughout the Act in various connections: as, for instance, in the provisions relating to the transportation of commodities in which the carriers are interested (Section 1(8) of the Act), the free transportation of passengers (Section 1(7)), the discrimination and preference clauses (Sections 2 and 3), and the requirements for filing tariffs (Section 6). None of the definitions contained in Section 1 of "common carrier," or "railroad," or of "transportation," imposes, of itself, any duties upon common carriers or empowers the Commission to act. It is necessary to look to other provisions of the Act to determine the duty to be performed by "common carriers," by "railroads"

engaged in "transportation" as defined in Section 1(3)(a).

This is aptly illustrated by *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434, where the Commission sought to assert its jurisdiction over a company engaged in the furnishing of cars to carriers and to shippers by investigating the private affairs of such company. The Commission argued in that case, as do the appellants in the case at bar, that the Commission had jurisdiction in the premises because of the definitions contained in Section 1(3)(a) of the Act. The Court rejected this contention and said at page 443 as follows:

> "The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, tank and box cars, and that lets these cars to the railroad or to shippers. It also owns and operates icing stations on various lines of railway, and from these ices and reices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, &c., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. *It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the*

Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, &c., is to be effected by its control over the railroads that are subject to the act. *The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself.* The petition of the Interstate Commerce Commission to compel an answer to its questions hardly goes on any such ground." (Emphasis supplied.)

Not even all common carriers are subject to regulation, but only common carriers, among others, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment (Section 1(1)). Thus, even where a company's status as a common carrier is undisputed, it does not follow that the company is subject to the Act, if it is not within the class of common carriers which is included. *Ex Parte Koehler*, 30 Fed. 867, 869; *The Parmelee Transfer Company Case*, 12 I.C.C. 40, 41. As the Court said in *Pennsylvania R. Co. v. P. U. Comm'n*, 298 U.S. 170, 174:

"The Interstate Commerce Act (49 U. S. C. § 1 *et seq.*) is aimed at common carriers exclusively, § 1(1), (3), and not even at all these. With exceptions plainly unre-

> lated to this case, § 1(1)(b), (c), carriers, even though common, are unaffected by the Act unless they are carriers wholly by railroad, or if partly by railroad and partly by water, are operating under a 'common control, management, or arrangement for a continuous carriage or shipment.' § 1(1)(a). * * * There are limitations, moreover, in respect of the conduct to be controlled in addition to the foregoing limitations in respect of the carriers to be regulated. * * *"

Cf. *Black and White Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U.S. 518; *Del., L. & W. R.R.* v. *Morristown*, 276 U.S.182.

The fallacy implicit in the appellants' argument to the effect that, simply because the definitions in Section 1(3)(a) cover contracted facilities, thereby the Commission has regulatory control over the owners of those facilities—in the absence of explicit provisions in the Act to this effect—is immediately apparent when it is remembered that it was necessary for Congress, by special enactments for that purpose, to include express companies, pipe line companies and sleeping car companies within the term "common carrier" before such companies were considered subject to the regulatory authority of the Commission. And the Commission's lack of authority over the Stock Yards in the case at bar is strikingly illustrated in the long history of the Commission's attempts to extend its regulatory authority over the compensation which rail carriers should pay for the use of privately owned cars. In the case of *Refrigerator Car Mileage Allowances*, 232 I.C.C 276,

278-9, the Commission evidenced its incapacity over this subject without specific legislative authority:

> "However, a review of the various provisions of the law which we administer leads us to the conclusion that the Commission is without authority to pass upon or to fix the compensation paid by railroads to private-car companies for the use of equipment furnished by them directly to the railroads. The relation between such companies and the railroads, as well as the Commission's power over such private-car companies was considered by the Supreme Court of the United States in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, in connection with the law as it stood prior to the enactment of the car-service provisions in 1917. * * *
>
> "It is clear from the language quoted that the Commission at that time had nothing to do with the compensation paid to private-car companies, and we do not understand that the Congress broadened our power when it passed the car-service provisions in 1917. The purpose of that legislation, as can readily be gathered from an examination of the proceedings before the Congress, was to give this Commission jurisdiction over the practices in respect to car service as between the carriers in order to obtain greater use of the equipment and thus prevent car shortages. * * *
>
> "It seems certain that the Congress had in mind only the dealings between common carriers, one with another, and did not contemplate the prescription of compensation which a common carrier should pay to a

private-car company for the use of its equipment. The amount of such compensation would have no direct bearing upon the matter of car shortages, which it was the purpose of the car-service amendments to avoid or reduce. The amount to be paid under such circumstances is properly left to the judgment of the management in the same way that expenditures for equipment and maintenance are left to the discretion of the carriers, themselves. *While such expenditures, if excessive, may be taken into account in considering the efficiency and economy of the carriers' operations, it seems clear that the Commission has not been given any authority to determine what such expenditures should be.*" (Emphasis supplied.)

This Court also has had occasion to rule on this matter in *General American Tank Car Corporation* v. *Eldorado Terminal Co.*, 308 U.S. 422, 428-429:

"Freight cars are facilities of transportation, as defined by the Act. The railroads are under obligation, as part of their public service, to furnish these facilities upon reasonable request of a shipper, and therefore have the exclusive right to furnish them. They are not, however, under an obligation to own such cars. They may, if they deem it advisable, lease them so as to be in a position to furnish them according to the demand of the shipping public and, if the carriers do so lease cars, the terms on which they obtain them are not the subject of direct control by the Interstate Commerce Commission. If the carriers pay too much for the hire of such cars the Commis-

sion may, of course, refuse to allow them to reflect such excess cost in their tariffs. *The lessor of such cars to a railroad, however, is not itself a carrier or engaged in any public service. Therefore its practices lie without the realm of the Commission's competence.*" (Emphasis supplied.)

See also *Ellis* v. *Interstate Commerce Commission*, *supra*, pages 443-444.

Finally, Congress itself has recognized the Commission's initial lack of jurisdiction over private car lines when in the Transportation Act of 1940 it amended Section 1(14) of the Act so as specifically to provide such authorization.[26] Obviously,

[26] The legislative history of the Transportation Act of 1940 reveals that none of the bills as they were originally introduced in the Congress looking toward the numerous amendments which were added to the Act at that time provided for increased authorization of the Commission over private car lines. The subject was first mentioned in the course of the hearings on S. 2009, 76th Congress, 1st Session, which ultimately, as amended, was enacted as the Transportation Act of 1940. As initially mentioned, it was proposed by representatives of shippers of fresh fruits and vegetables that the Commission be given authority to regulate the compensation which the rail carriers should pay for the use of refrigerator cars. (Hearings, Senate Committee on Interstate Commerce, 76th Congress, 1st Session, on S. 1310, 2016, 1869, and 2009, p. 434). Subsequently, it was proposed to give the Commission such jurisdiction not only with respect to refrigerator cars but also with respect to all private cars, and it was suggested that this could be accomplished simply by amending Section 1(3)(a) so as to insert the term "private car companies" immediately following the term "express companies" already appearing in said Section (*Id.* p. 558). Senator Reed, presiding at the hearing, expressed approval of the suggestion, but stated that he would request the Interstate Commerce Commission to prepare appropriate language to accomplish the result desired. Subsequently, in the course of the hearing, Senator Reed asked Commissioner Eastman, who appeared for the Commission, whether the Commission's jurisdiction over the compensation to be paid by rail carriers for

if the appellants' contention that the mere listing of transportation facilities in Section 1(3)(a) subjects the owners of such facilities to the Commis-

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the use of private cars could not be accomplished simply by inserting the term "private car companies" after the term "express companies" in Section 1(3)(a). Commissioner Eastman stated that it would be necessary to amend the Act in a different manner than that suggested and promised to have the necessary language prepared. (*Id.* pp. 786-787). It is to be noted from this incident that the Commission itself recognized that the definitions contained in Section 1(3)(a) do not in and of themselves empower the Commission, and that the Commission's power stems from the substantive provisions of the statute.

The only further explanation for the amendment of Section 1(14)(a) appears in the House Report (House Report No. 2832, 76th Congress, Third Session [To accompany S. 2009]) in which the statement is made (page 65):

> "Section 4(A). Car Service; Protective Service.
> "Section 5 of the House amendment amended Section 1(14) of the Interstate Commerce Act so as to make it clear that the Commission's jurisdiction with respect to car service and the compensation to be paid for the use of any car now owned by the carrier using it includes a car of private as well as of carrier ownership. The conference substitute in Section 4(A) retains this change in present law and also gives the Commission increased authority as to the terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle. The conference substitute adds a new subparagraph (b) to Section 1(14) requiring approval of the Commission in the case of contracts for the furnishing to common carriers by railroad, or to express companies, of protective service against heat or cold."

Thus, it is clear that both Congress and the Commission deemed it necessary, in order to empower the Commission to regulate the compensation as between carriers and private car companies, to amend Section 1(14)(a) of the Act and that neither Congress nor the Commission felt this could be accomplished simply by including private car companies within the concept of common carrier as defined in Section 1(3)(a).

sion's jurisdiction, it would have been unnecessary for the Interstate Commerce Act to be amended in 1940 to subject private car lines to regulation.

Equally pertinent are the circumstances governing the recent amendment of the Interstate Commerce Act to extend the Commission's authority over the activities of freight forwarding agencies, 49 U.S.C. 1001 *et seq.*

It is clear upon principle and authority that the status of the Stock Yards, insofar as concerns the question of whether the ownership of the track in question subjects it to regulation by the Commission, is fixed by the functions it performs. This function may be stated thus: It owns a private track located on its premises and permits the railroad to use it for specified purposes. It does not hold itself out to the public to permit the entire public to use this track under unlimited conditions; it deals only with the railroad carrier; it has no interest in the transportation charges of any of the railroads, it does not file tariffs; it has no motive power; it could not carry goods from place to place if it wanted to; it is not engaged in "transportation" either as that term is defined or used anywhere in the Act. There is no common ownership, management, control or arrangement between the Stock Yards Company and the railroad carriers such as that contemplated by Section 1(1)(a) of the Act. Manifestly, the Stock Yards is not a common carrier in any sense by virtue of its ownership of this track. It is at most a company permitting a carrier (and not the public) to use its track for limited purposes.

Section 2 of the Elkins Act does not empower the

Commission to issue the order in question: It is now apparently conceded by appellants that the Commission has no jurisdiction over the person of the Stock Yards on the theory that it is a common carrier subject to the Act. Although the complaint filed by Swift & Company in the proceeding before the Commission alleged that the Stock Yards was a common carrier, this position was never asserted seriously, but, on the contrary, it was argued both orally and in the briefs before the Commission and the court below that the Commission had jurisdiction over the person of the Stock Yards by virtue of Section 2 of the Elkins Act (49 U.S.C. 42).

Indeed, it is apparent that Swift & Company has never really believed that the Stock Yards was a proper party to this proceeding under any circumstances. During the course of the oral argument before the Commission on October 3, 1945, counsel for Swift & Company stated (R. 542):

> "Now, you will notice in this correspondence they have talked about, that the Stock Yards said with respect to the railroad—and I think *the railroad is the only person whom I have a remedy against here*—that they would not let them use this track without proper compensation. There has never been any suggestion to us by the New York Central as to what compensation they ought to have, if any." [Emphasis supplied.]

The court below found it unnecessary to decide whether, by virtue of Section 2 of the Elkins Act, the Commission had jurisdiction over the person of the Stock Yards, since, in the view taken by the court below, the order was otherwise invalid be-

cause the Commission had erred in holding the Stock Yards without power to restrict the use of its Track 1619 in the absence of an acquisition by the carriers of the track by purchase or condemnation. The disposition of this case by the court below was correct in law and in fact. Nevertheless, it is submitted that the Commission does not have any jurisdiction over the person of the Stock Yards by virtue of Section 2 of the Elkins Act.

At the outset, it should be emphasized that there is not even a contention in the case at bar that a violation of the Elkins Act is in any manner involved herein.[27] On the contrary, the Commission's assertion of authority with respect to the Stock Yards was predicated upon its view that any person having contractual relations with a carrier may be made a party to a proceeding between the carrier and a shipper even where the subject matter of the controversy between the shipper and carrier relates entirely to matters with which the Elkins Act is not concerned. The Commission's view in this respect was rejected many years ago by this Court. *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434. It is the contention of the Stock Yards that Section 2 of the

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[27] There is at least an inference in the Government's brief (p. 49, note 10) that the arrangement between the Stock Yards and the railroads might violate the Elkins Act. That inference, however, is wholly unwarranted and misleading and typifies the manner in which the Government has consistently sought to buttress the Commission's order by injecting into the case extraneous issues of fact and principles of law. The uncontroverted fact is that there is no intimation in the record that the Commission ever entertained any notion that the practices condemned by the Elkins Act have been employed by the appellees herein.

Elkins Act merely authorizes the Commission or the court, *in proceedings before them involving the practices condemned by the Elkins Act*, to make all persons participating in or affected by such practices parties to the proceedings and subject to appropriate orders and writs. The Stock Yards' contention, therefore, is that no support can be found for the Commission's order against it, by resort to Section 2 of the Elkins Act, in view of the absence in the record of any circumstance tending to show violations of the substantive provisions of the Elkins Act.

This follows from a consideration of the provisions of Section 2 and related sections in the light of the language of the Elkins Act, of its legislative history, and of the evil against which it was directed.

Section 2 of the Elkins Act (49 U.S.C. 42) provides as follows:

> "§ 42. *Parties included in proceedings to enforce law.* In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

The Stock Yards contends that the admittedly broad language of this Section should be read in the light of other sections of the Elkins Act. When so construed, the jurisdiction of the Commission, as of the courts, under Section 2 of the Elkins Act, over "persons interested in or affected by the rate, regulation, or practice under consideration," refers to the acts condemned by Section 1 of the Elkins Act (49 U.S.C. 41).[28]

The Commission and the courts, by Section 1 of the Elkins Act, are given authority to deal with a situation involving "any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to" the Interstate Commerce Act "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier . . . or whereby any other advantage is given or discrimination is practiced." *Union Pac. R.R.* v. *United States*, 313 U.S. 450, 464.

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[28] This Court has aptly said, in this connection (*Baltimore & Ohio Ry.* v. *United States*, 277 U.S. 291, 299-300):

> "The word 'practice', considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it."

Thus, such terms as "rules," regulations," and "practices" are not loosely used in the Elkins Act or in the Interstate Commerce Act, but are to be confined to the context in connection with which they immediately appear.

As will be hereinafter shown, Congress was preoccupied, in enacting the Elkins Act, with the widespread abuses involved in the granting of secret rebates to the large shippers (see pp. 70-75, *infra.*). Specific reference in Section 1 of the Elkins Act was made to such abusive practices. The Stock Yards contends that Section 2, likewise, was enacted with reference to such matters. Certainly Section 3 was aimed at providing a new remedy for striking down such abuses. Except for the possibility that Section 2 may be said to have a broader objective, it is submitted, therefore, that the Elkins Act, in its entirety, was addressed to the problem of combating devices by which railroads conferred rate advantages upon favored shippers.

The history of the legislation known as the Elkins Act clearly supports the Stock Yards' assertion that the Elkins Act in its entirety was intended by Congress to deal with the problem of preventing the giving of rate concessions or advantages to favored shippers. That this problem was uppermost in the minds of all who participated in the passage of the legislation is revealed both in the Annual Reports of the Commission for the several years preceding enactment of the legislation and immediately thereafter, and also in the legislative reports and debates pertaining to this measure.

For several years immediately preceding enactment of the legislation, the Commission's Annual Reports were predominantly concerned with the matter of rebates and other forms of rate concessions which the railroad companies were grant-

ing to the large shippers of the day. (See, for example, the Twelfth Annual Report of the Interstate Commerce Commission (1898), pp. 5 *et seq.*; Fifteenth Annual Report (1901), pp. 5-16.) In the 1901 Report, appears an elaborate discussion of the prevalence of these practices as revealed in the Commission's investigation of the rates secretly being charged to the major meat packing corporations in connection with the movement of packing house products.

In its 1903 Report, the Elkins Act was highlighted and discussed at length (Seventeenth Annual Report of the Interstate Commerce Commission (1903), pp. 5-10). The Commission pointed out that the Elkins Act, "broadly speaking," affected only the practices relating to departures from published tariffs. After an analysis of the provisions of the new legislation, the Commission said (p. 10):

> "* * * No one familiar with railway conditions can expect that rate-cutting and other secret devices will immediately and wholly disappear, but there is basis for a confident belief that such offenses are no longer characteristic of railway operations.
>
> "* * * The wrong-doing which this legislation seeks to more effectually prevent has its origin and inducement almost altogether in the competition between carriers, and so long as that competition is subjected to no legal restraint it will be liable to find expression to a greater or less extent in secret and preferential rates. * * * In its present form the law appears to be about all that can be provided against rate-cutting in the way of prohibitive and punitive legislation."

The record of the legislation in Congress itself is in the same vein. Especially indicative of Congressional intention respecting the legislation is the discussion in the House Report (House Report No. 3765, 57th Congress, Second Session, February 12, 1903 (to accompany S. 7053)). The Report states that there were "four principal propositions included in the bill." The first was to make corporations liable in the same manner as individuals. As to the second, the Report stated (page 5):

> "The existing law prohibits rebates and discriminations, but does not prevent the cutting of published rates unless discrimination is shown."

Investigations by the Interstate Commerce Commission respecting rates on dressed beef and packing house products were adverted to as revealing that the railroads for years had carried such products at substantially below published rates. While this secret rate-cutting did not result in discrimination between the shippers, it had the effect of giving the established packers "absolute control of the business."

The third proposition noted in the House Report as being included in the bill involved Section 2, the Report stating (pages 5-6):

> "Section 2 of the bill makes it lawful to include as parties to any proceeding for the enforcement of the Interstate Commerce Act, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration and authorizes final judgment against such additional party. This is a much-needed

amendment to the Act, for the purpose of enabling all parties in interest to be brought before the court in the same suit."

As to the third proposition, the Report stated (page 6):

> "The first and second propositions above referred to practically exhaust the power of legislation to prevent rebates and discriminations through criminal prosecutions. *We conceive it to be the desire of Congress to absolutely prevent, if possible, the granting of discriminations in the way of railroad rates to favored shippers. This is by many claimed to be the greatest abuse of the day.* But we all know that the officers of the railroads who grant rebates and the officers of the private corporations who solicit and accept them are men of high standing * * * and that it is a very difficult matter to obtain evidence sufficient to indict them, and still more difficult to obtain judges and juries who will convict them.
>
> "It is proposed, therefore, to provide a civil remedy as well as a criminal remedy against rebates and discriminations." (Emphasis supplied.)

There was practically no debate on the bill (S. 7053) in the Senate (36 Cong. Rec. 1632-1634). Such debate as there was in the House (36 Cong. Rec. 2151-2159) clearly shows that the Congress was concerned predominantly with the question of concessions and rebates and other devices whereby carriers were charging particular shippers rates less than the published tariffs. The Congress was preoccupied with the whole problem of trusts and monopolies and considered the rebate question as

merely one aspect of the trust problem with which it was confronted. The statement of Representative Overstreet is typical:

Representative Overstreet said:

> "Mr. Speaker, those members of the House who undertook in a straightforward way to reach some conclusion by way of legislation upon this problem sought to accomplish three things, * * * The first of these propositions was a measure to expedite cases now pending in order that we might have the judgment of the Supreme Court upon some of these problems. That bill has passed and I think it is now a law. The second proposition was some measure of publicity through which great corporations might be compelled to disclose certain methods of doing business, and especially those things upon which rests the valuation of their capital stock. *The third proposition was the effort against discriminatory practices in rebates, existing between great shippers and carriers.*
>
> * * *
>
> "The chief and most material part of this bill now under consideration directly affects the discriminatory practice in rebates. * * * *" (36 Cong. Rec. 2153) (Emphasis supplied.)

Objectively considered, the entire legislative history of the Elkins Act inevitably leads to the conclusion that the Elkins Act in its entirety was addressed to the problem of preventing the granting of secret rate concessions and advantages to favored shippers. Section 2 of the bill, although it does not in terms specifically refer to this prob-

lem, was not discussed independently of the remaining provisions of the bill and it may be fairly assumed, therefore, that Section 2 was intended to provide a mechanism for effectuating the substantive provisions of the legislation.

The authorities[29] upon this point fail to support the Government's contention that, under the circumstances of record herein, jurisdiction may be asserted by virtue of Section 2 over the person of the Stock Yards. Wherever jurisdiction has attached over a non-carrier in cases involving Section 2 of the Elkins Act, the case has involved rate advantages of the character discussed above and the non-carrier has been an instrumentality by which such rate advantage was effectuated.

If it should be determined that Section 2 of the Elkins Act was intended to empower the Commission to order the unlimited use of the Stock Yards' track under the facts herein disclosed, the Stock Yards would be deprived of its property without due process of law. *Producers Transportation Co.* v. *Railroad Comm'n of California*, 251 U.S. 228. *Cf. Del., L. & W. R.R.* v. *Morristown*, 276 U.S. 182. A statute should, if fairly possible, be construed not only to avoid the conclusion that it is unconstitutional, but also grave doubt on that score. *National Labor Relations Board* v. *Jones &*

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[29] *United States* v. *Milwaukee Refrigerator T. Co.*, 145 Fed. 1007; *United States* v. *Phillips Petr. Co.*, 36 F. Supp. 480, 484; *Glens Falls Portland Cement Co.* v. *Delaware and Hudson Co.*, 66F. (2d) 490, 491-492; *Spencer Kellogg and Sons* v. *United States*, 20 F. (2d) 459, cert. den. 275 U. S. 566; *New York, N. H. & H. R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361; *General American Tank Car Corporation* v. *Eldorado Terminal Co.*, 308 U. S. 422; *Union Pacific R.* v. *United States*, 313 U. S. 450.

Laughlin Steel Corp., 301 U.S. 1, and cases cited therein; *Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440. This salutary rule is applicable in determining the meaning to be accorded to Section 2 of the Elkins Act where not only the language but also the purpose and history of the Act clearly show that Congress did not intend thereby to give the Commission jurisdiction over non-carriers whose dealings with carriers do not involve devices whereby rate advantages among shippers are effectuated.

By none of the indicia indicated as calling into play the powers of the Commission under the Elkins Act could the Commission conceivably have jurisdiction over the Stock Yards. The Stock Yards do not buy, sell, or own livestock. Neither is it a shipper or consignee of livestock. No question of rebate, concession, discrimination, or advantage, whereby less than published rates are charged, is here involved. It was not contended before the Commission or in the court below, nor did the Commission find, that the Stock Yards was securing any rebate or was the agency by which any rebate was made to anyone. Neither is the Stock Yards "interested in the traffic" of the railroads moving over the lines of the common carriers in the sense in which that expression appears in Section 3 of the Elkins Act. The record shows that the Stock Yards is willing for any traffic to move over its Track 1619 so long as it receives therefor the compensation which it proposed. It is totally disinterested in the charges as between the shipper and the carrier.

As this Court said in *Ellis* v. *Interstate Commerce Commission*, 237 U.S. 434, 445:

> "The Armour Car Lines not being subject to regulation by the Commission its position was simply that of a witness interested in but a stranger to the inquiry, and the Commission could not enlarge its powers by making the company a party to the proceedings and serving it with a notice. * * * ".

B. *The trackage agreement governing the use of Track 1619 is not subject to the Commission's control.*

In the last analysis all of the contentions made by appellants to support the Commission's order rest basically upon the fact that the Stock Yards had contractual relations with a common carrier by rail subject to the Act. But the difficulty with all of the contentions predicated upon this circumstance is that the Commission was not empowered, by virtue of this fact, to limit the Stock Yards' control over use of Track 1619.

Even with respect to contracts between common carriers by rail which are subject to the jurisdiction of the Commission, the authority of the Commission with respect to trackage agreements *between carriers* is strictly limited by the provisions of the Act. Thus, Section 1 (18) of the Act, which deals with the authority of the Commission with respect to extensions and abandonments of lines, provides that "Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, *without the approval of the Commission*, for the joint ownership, or joint use of

spur, industrial, team, switching, or side tracks." [Emphasis supplied.]. The Commission has held that this Section means what it says, namely, that carriers may make the indicated types of contracts without its approval (*Chicago, M., St. P., and P. R. Co. Trustees Operation*, 247 I.C.C. 1, 7). This decision was after the passage of the Transportation Act of 1940 which gave the Commission authority to approve certain types of agreements between carriers as provided in Section 5 (2) of the Act. The Commission pointed out that other arrangements between carriers for the joint operation of spur tracks than those mentioned in Section 5 (2) could be made without its approval.

By virtue of the provisions of Section 5 (2) of the Act, as amended by the Transportation Act of 1940, it is provided (Section 5 (2) (a)) that it shall be lawful, with the approval and authorization of the Commission, for

> "* * * two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another." (Section 5(2) (a) (i).)

It is also provided that it shall be lawful, with the approval and authorization of the Commission,

> "* * * for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto." (Section 5(2) (a) (ii).)

The careful and specific manner in which the Congress has empowered the Commission to regulate certain types of trackage agreements between

carriers—*Thompson* v. *Texas-Mexican R. Co.*, 328 U.S. 134—and has excluded certain other types of trackage agreements between carriers from the authority of the Commission, shows conclusively that there has been no intent to confer any general authority on the Commission with respect to all types of trackage agreements. *No provision will be found in the Interstate Commerce Act which gives the Commission any authority with respect to trackage agreements made by carriers with non-carriers for the right to use tracks owned by the non-carriers for special purposes.*

Even in the situations in which the Congress has specifically conferred authority upon the Commission to deal with trackage agreements between common carriers by rail, it is to be noted that the Congress has not declared any general policy to the effect that such trackage agreements are invalid for any reason.

Trackage agreements of the character of the one here involved are widely made by carriers throughout the country and, indeed, it is to the advantage of the shipping public that this should be so.

The manner in which the Commission treated the trackage agreement between the Stock Yards and the New York Central Railroad Company with respect to the limited use of Track 1619 is in direct conflict with the prior decisions of the Commission and of the courts upon the subject of trackage agreements wherever the question has arisen,[30] and if the Commission's order were upheld it would seriously interfere with the objectives of the Na-

[30] See note 18, *supra*.

tional Transportation Policy declared by Congress by disabling carriers from making arrangements beneficial to the shipping public.

In view of the departure of the Commission in the case at bar from its own prior decisions on its powers with respect to trackage agreements, as well as its departure from the holdings of this Court and of other courts upon the same subject, the Stock Yards feels that it is appropriate to analyze some of the previous decisions upon the subject of trackage agreements.

This Court had occasion to consider and to recognize the validity of agreements of the type now under consideration in *Rock Island Ry.* v. *Rio Grande R.R.*, 143 U.S. 596. This case was an appeal from a judgment construing a contract between the predecessors of the Rock Island Railway and the Rio Grande Railroad, whereby certain facilities, including the Denver station of the Rio Grande, were leased to Rock Island. In affirming the decision of the lower court, this Court upheld the contract made by the parties, and *held, among other things, that the Rock Island Railway did not have the right, under the contract, to use the Denver station of Rio Grande for traffic not contemplated by the parties to the contract.*

Union Pacific Railway Co. v. *Chicago, etc., Ry. Co.*, 163 U.S. 564, one of the leading cases on this subject, also involved the right of a railroad to secure specific performance of a trackage agreement between two common carriers. The Court held that the cases[31] dealing with the inability of

[31] Cases involving contracts which dispossess common carriers of all of their property and of all capacity to

railroads to make contracts by virtue of which they disabled themselves from performing their duties as common carriers imposed by law were inapplicable to the trackage agreement under consideration, for the reason that the carrier which owned the property involved and had contracted for its use by another, had not disabled itself from performing any duties imposed upon it. At page 589 this Court said:

> "We are of opinion that it was within the powers of the Pacific Company to enter into contracts for running arrangements, in-

perform their public duties are inapplicable. See also note 25, *supra*. In the case at bar, the Commission, in its report of May 3, 1946, evidently viewed the case as one in which this principle was applicable, and, indeed, the brief filed on behalf of the Government in this Court states such issue to be the principal question. There can be no doubt, of course, about the principle, but it is inapplicable to the facts in the case at bar just as it was inapplicable in the case before this Court in *Union Pacific Ry. Co.* v. *Chicago, etc. Ry. Co.*, 163 U. S. 564. This is true because the principle only becomes applicable where there is a duty on the part of the railroad imposed by the Interstate Commerce Act or otherwise; but there can be no duty where there is no power and, in the case at bar, there is clearly no power upon the part of the common carriers by rail to operate over the Stock Yards' Track 1619 in defiance of its contractual right. *Alford* v. *Chicago, Rock Island and Pacific Ry. Co.*, 3 I. C. C. 519, 532-533, and authorities in note 18, *supra*. Thus, both the Commission, in the proceeding before it, and the appellants now, misstate the issue by assuming a power on the part of the railroad carriers to operate over Track 1619, and, hence, a duty. The same result is inevitably reached when viewed from another aspect: Namely, by the trackage agreement the New York Central Railroad Company cannot be said to have disabled itself from performing its duties with respect to its lines which it fully controls. On the contrary, it secured the right to serve Swift & Company in a manner in which it would have been unable to do without such rights as it did secure und · the trackage agreement.

cluding the use of its tracks, and the connections and accommodations provided for, and we cannot perceive that this particular contract was open to the objection that it disabled the Pacific Company from discharging its duties to the public. By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy. *If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy.* Ability to perform its own immediate duties to the public is the limitation on its *ius disponendi* we are considering, and that limitation had no application to such a use as that in question." (Emphasis supplied.)

In speaking of the compensation agreed upon by the parties to the trackage agreement before it, the Court had the following to say, at page 594:[22]

[22] What this Court said in the *Union Pacific Railway* case (163 U. S. at p. 594), respecting compensation, is in marked contrast to the holding of the Commission in the case at bar (R. 38, 39, 40). The Commission, in concluding that the railroad carriers and the public had the *right* to operate over Track 1619 of the Stock Yards because of the contract, but, at the same time, anomalously

"* * * And as, when it contracts for deliveries beyond its own line, it must pay the connecting company for its services, that *compensation might be fixed by the parties upon any basis they agreed to.* Here it agreed to pay a certain sum per mile for the mileage over which its trains run, and the difference between that and any other mode of payment did not go to the powers of the company. Where a corporate contract is forbidden by a statute or is obviously hostile to the public advantage or convenience, the courts disapprove of it, but when there is no express prohibition and it is obvious that the contract is one of advantage to the public, the rule is otherwise." (Emphasis supplied.)

Courts in other jurisdictions have similarly considered the problem of trackage agreements and

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holding that the restriction as to the use of its property by the Stock Yards for the hauling of livestock was unlawful, said (R. 40):

"* * * *it is our opinion that the stockyards could not lawfully collect, or the Railroad pay, either yardage charges or any other amount of special compensation in effect demanded from the Railroad as a penalty for observing its tariffs and other duties under the laws to which it is subjected.*" (Emphasis supplied.)

Now the Government, in its brief filed in this Court (p. 44 *et seq.*), seems to argue that this Court should not concern itself with the compensation which the common carriers by rail should pay the Stock Yards for use of its track for moving livestock, since it contends that such matters are of private concern between the carriers and the Stock Yards. This reference to the vacillating position taken by the Commission in the proceeding before it, which was clearly erroneous, and the position now apparently assumed by appellants, is merely cited as another instance of the confusion with which the Commission and the other appellants have surrounded this case and the true issues involved from the beginning.

have reached the conclusion that the railroad which acquires a mere right to traverse a track owned by another person must operate upon that track in accordance with the limitations imposed by the grantor of the right.[33]

In *K. & M. Ry. Co.* v. *The Public Utilities Commission of Ohio*, 96 Oh. St. 414, the Supreme Court of Ohio upheld the validity of a trackage agreement between two railroads.[34] In that case the Hocking Domestic Coal Company filed a complaint with the Public Utilities Commission of Ohio,[35]

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[33] *Morgan Run Ry.* v. *Public Utilities Commission*, 98 Oh. St. 218, does not controvert the proposition stated in the text, since examination of the facts before the Supreme Court of Ohio in that case reveals that the decision was reached because of facts not present in the case at bar. In the *Morgan Run Railway* case, the common carrier by rail which was refusing to ship coal over the lines of a coal company to another person on the ground that the track on the property of the coal company (over which it had to operate to reach such person) was owned by the coal company and not by it, really owned the coal company also. In short, there was common ownership of the common carrier and of the coal company. The record in that case also showed that the carrier had for years reported the whole track as its own for tax purposes and that the carrier had not refused to ship coal until the complainant and the coal company (owned by carrier) had got into a contract dispute. Where the question of trackage agreements has come before it unfettered by any such considerations, the Supreme Court of Ohio has fully sustained the validity of trackage agreements, including the restrictions therein, similar to the one here involved. *K. & M. Ry. Co.* v. *The Public Utilities Commission of Ohio*, 96 Oh. St. 414.

[34] The same trackage agreement was upheld by the Interstate Commerce Commission in *Hocking Domestic Coal Co.* v. *K. & M. Ry. Co.*, 44 I. C. C. 392. See text, *infra*, at pp. 95-96.

[35] In Ohio, railroads, as well as public utilities, are subject to the supervision of and regulatory powers of the Public Utilities Commission. Page's *Ohio General*

alleging that its mines were located along the lines of the K. & M. Railway and that the railroad was refusing to furnish cars to take coal from it. The railway company defended its position on the

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Code (Annotated), Sections 501; 502, 614-3. There are some vague references in the Government's brief to the jurisdiction of the Public Service Commission, or of the Interstate Commerce Commission, over the abandonment by New York Central of operation over Track 1619. The short answer to whatever is meant to be implied by such references is that no such abandonment has ever occurred as would necessitate a determination of whether the Public Utilities Commission of Ohio, under its jurisdictional statutes, or the Commission, under Section 1(18) of the Act, would be authorized to approve such abandonment. The record herein does not show that the New York Central is seeking to abandon its limited right to operate over Track 1619. This is another instance in which the Government in its brief has wandered off into matters not related to facts in the record. Although the Court below excluded it from the record as having been sent after the proceeding before the Commission was closed (R. 142), the Government has discussed in its brief (note 9, p. 39) a letter (Ex. E, R. 54) by which the Stock Yards, following the Commission's order of May 3, 1946 (in which the Commission indicated the Stock Yards might do so (R. 38, R. 40)), pursuant to the trackage agreement, advised New York Central that, effective May 1, 1947, it would altogether withdraw the right to use its Track 1619. Meantime, however, before the May deadline was reached, the court below enjoined the unlawful order of the Commission which had wrongfully ordered Track 1619 to be used to the Stock Yards' detriment. Hence, there was no occasion for the Stock Yards to proceed with its plans to withdraw the use of its track on May 1, 1947, in order to protect its interests. Consequently, the Stock Yards postponed its notice and permitted the carrier to continue the limited use of the track which it had always made of it, with a proviso that the notice to terminate would again become effective on notice. All of these facts are dehors the record, and have no bearing on the issue, but the Stock Yards feels that the Court is entitled to know them in order that it may not be mislead by the Government's brief into concluding that any issue respecting an abandonment is involved in the case at bar.

ground that it had no right under the terms of the contract respecting its operation over the tracks in question to make such connection with the mine of the Hocking Domestic Coal Company. The Supreme Court of Ohio upheld the validity of the trackage agreement. The court said, at page 426 of its opinion, that:

> "Our holding is that plaintiff in error under the limitations and restrictions contained in the trackage agreement has no right to the use of the switch connection with the mine tracks of The Hocking Domestic Coal Company, nor has it any authority to use the right of way of The Hocking Valley Railway Company in making a connection between its drill track and the mine tracks of the Coal Company.
>
> "But it is urged by counsel that even though plaintiff in error is prevented by the restrictions and limitations in the trackage agreement from rendering the service which the Coal Company is seeking, yet such an agreement is against public policy and void.
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> * * *
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> "* * * We know of no statute which would require The Hocking Valley Railway Company to grant the use of its facilities for that purpose. When it granted the use of its tracks and sidings between Gallipolis and Pomeroy, it did so voluntarily, subject, however, to certain limitations and restrictions. It is not likely that a trackage agreement would have been consented to without those limitations and restrictions, * * *
>
> "We see no valid legal objection to this agreement. Similar agreements have met

the approval of the supreme court of the United States in a number of cases, among which are *Union Pacific Ry. Co.* v. *C., R. I. & P. Ry. Co.*, 163 U. S. 564, and *Chicago, R. I. & P. Ry. Co.* v. *Denver & R. G. Ry. Co.*, 143 U. S. 596."

In *Sholl Brothers* v. *The Peoria and Pekin Ry.*, 276 Ill. 267, Sholl Brothers sought and obtained an injunction against the railroad, preventing it from moving on or over tracks located on a certain right of way any coal or coal mine products not mined or produced on the lands or by virtue of the coal rights of Sholl Brothers. The Supreme Court of Illinois affirmed this judgment. Involved was a contract between the coal company and the railroad for the joint construction and maintenance of a track extending over the property of the coal company from the main line of the railroad to the coal mine, giving the railroad company the "right to use said right of way and tracks in handling the business of or for the purpose of making connection with any other industry, *except coal mine*, that may hereafter be located adjacent to said right of way or reached from said right of way" [Emphasis supplied]. There were no industries other than the Sholl Brothers' mine adjacent to or reached by this right of way at the time the track was laid over it. However, about the time the track was completed, a site for the state asylum for the insane was chosen just beyond the land of Sholl Brothers' mine, and the commissioners of the asylum constructed railway tracks on the asylum grounds which they connected with the tracks on Sholl Brothers' land, and thereafter the latter track was

used for the transportation of freight to the asylum. Sholl Brothers furnished the asylum with coal, but in some instances coal was delivered to the asylum which was produced at some other mine than that of Sholl Brothers. In 1911, the railroad company issued a tariff showing a rate for the delivery of coal over the track in question to the asylum, and announced that such service was open to all persons who might demand it. It afterwards did deliver to the asylum over such tracks cars loaded with coal from mines other than those on the land of Sholl Brothers, one of them being a mine located on its main line. The Supreme Court of Illinois said, at page 271 that:

> "* * * It must be remembered in this connection that the railway company does not own this right of way. The fee in the land and right of way is owned by the defendants in error, *and the right of the railway company to use the tracks and right of way is restricted to whatever rights it has by the terms of the contract.*" (Emphasis supplied.)

And at page 274 *et seq.*, the Court said:

> "* * * It is shown by the evidence, and not disputed, that for many years after the contract was made and the track used, and after the insane asylum was occupied, the officers of plaintiff in error refused shipments of coal over said track from any mine except that of defendants in error without their consent, thus showing their construction of the contract. This construction and interpretation of the contract by the parties thereto must now be considered, and we

think, under the circumstances, must be upheld as the proper construction and meaning thereof.

"Plaintiff in error also contends that such a construction of the contract would be contrary to public policy and void, * * * It is true that a railroad corporation cannot make a valid contract limiting the use of *its* tracks, which are declared to be public highways by section 12 of article II of the constitution. But that is not this case. *The side-track involved in this case is not a part of the public railway of plaintiff in error. It is connected with said railway but not a part of it, and could not become a part of the railway system of plaintiff in error unless it be purchased or acquired by condemnation proceedings. As hereinbefore pointed out, the right of way on which the track was built is the private property of defendants in error, and the right of the railway company therein is limited and governed by the provision of the contract that has been considered.*

"A case in point and which arose under similar circumstances is that of *Koelle* v. *Knecht*, 99 Ill. 396. * * * It was said on page 404 of the opinion: 'It would work monstrous wrong and injustice to compel an individual who had constructed a railroad across his farm to assume the duties and liabilities of a common carrier against his will and transport over his road all commodities that the adjoining landowner or his neighbors might require. Those who made that instrument did not intend to impose such duties and liabilities on private individuals against their will. It was only public railroads they intended to regulate,

and this switch is not of that character.' What is said in that case applies to the case at bar. * * *

"It would doubtless be of advantage to the State to be allowed to ship coal over this side-track to the asylum, but there is nothing in the circumstances of this case which gives the State any greater rights than an individual would have similarly situated." (Emphasis supplied.)

In *Alabama Central R.R. Co.* v. *Alabama Public Service Commission*, 200 Ala. 536, a railroad and a saw mill entered into a contract whereby the railroad acquired a license or right to operate its trains and service over the mill's logging road for the purpose of carrying freight and passengers for hire, but did not acquire the right to haul or transport pine logs or pine lumber over the logging road, except for its own use. The saw mill company retained the paramount right to the use of the tracks and reserved the right to take up the track or change its location. The railroad acquired the right to use a Y of the logging company and to erect upon the property of the saw mill company switches, side-tracks, and platforms necessary in conducting its business as a common carrier. Thereafter, another lumber company sought and secured from the Alabama Public Service Commission an order requiring the railroad to put in a side-track on the logging road of the saw mill company for the use of the rival lumber company in transporting its pine lumber through the agency of the railroad as a common carrier. The Supreme Court of Alabama said, at page 537:

"*If the logging road in question were a*

public highway, or a railroad in which the public had acquired rights by condemnation proceedings or by dedication to a public use, and its owners or those who had acquired control of it were common carriers, or were engaged in the business of a public service, then the Public Service Commission or the courts, when authorized by the Legislature, could regulate and control the use of the railroad so as to serve the public, and do so without discrimination. Here, however, the road involved is a private road and not a public one, and those who own, and have the exclusive control of it, are private individuals or corporations, who have merely consented or agreed that appellant, a public service corporation, may use it under certain restrictions and regulations. It may be, as we have said, that this contract or agreement is void, because against public policy; but, if so, it cannot be relieved against by compelling the parties to make a new contract, nor by compelling them to so modify it as to make it legal and binding on both parties. Neither the Public Service Commission nor the courts possess such powers. While the common carrier is so using this private road under a void contract, it may be liable as for damages for unwarranted discriminations; and its illegal contract might not excuse or justify for such discriminations; yet the common carrier has no right to put in switches or side tracks on this logging road without the consent of its owners, and, if such were placed, the owners would have the absolute right to remove them, and even the main line, and to wholly prevent the use of the road by appellant or by the public. Surely the Public Service Commis-

> sion nor the courts ought to compel a common carrier to use or improve private property in a way or manner in which it has no right so to use it, and could not voluntarily use it." (Emphasis supplied.)

In the case at bar, the Commission, in holding that the trackage agreement between the New York Central Railroad Company and the Stock Yards was valid for the purpose of giving the property to the railroad and to the public but invalid insofar as it contained limitations designed to protect the interests of the Stock Yards, departed from its own prior decisions upon this subject.

As long ago as 1890, the Commission held in *Alford* v. *Chicago, Rock Island and Pacific Ry. Co.*, 3 I.C.C. 519, that it had no authority to change a contract between two carriers which provided for trackage rights. In that case, the Commission was concerned with the construction and validity of a trackage agreement whereby one railroad secured the right to use the tracks of another railroad for the passage of its trains, but agreed not to do business on that portion of the tracks. A complaint was filed by a person located along the tracks who sought to have the Commission order the carriage of his freight by the carrier which had agreed not to do so in the trackage agreement. The Commission upheld the contract, including the limitation mentioned. The Commission said, at page 522:

> "This contract was made for that purpose, giving them the right to run their trains over the Union Pacific between Kansas City and Topeka. It was merely a trackage ar-

rangement, constituting in no sense a lease of the line of the Union Pacific. That company continued to operate its own lines as before."

And, at page 529 *et seq.*, the Commission said:

"But the main question which concerns us now is whether, while the agreement is conceded to be legal, so far as it makes a trackage arrangement, it is ineffectual in so far as it provides that the respondent shall not accept traffic between Kansas City and Topeka. Can the one part be sustained and the other part held void?

"Now it must be admitted, we think, that if this contract were to be sustained and enforced with the proviso stricken out, it would be a very different contract from that which we now have before us. It would, moreover, be a contract which we cannot think it probable these parties themselves would ever have agreed to make. *The proviso was beyond doubt a principal inducement on the part of the Union Pacific for entering into the arrangement; and we can not conceive that its managing authorities would ever have consented to the respondent coming upon its track to be competitor with it for traffic at all local points.* To strike out the proviso by holding it void would therefore be to take from the Union Pacific what probably constituted on its part a vital consideration and inducement for entering into a contract which, it is assumed, must now stand and be enforced without it. This assumption is grounded on the legal principle that an unlawful provision in a contract otherwise good may be rejected and the contract in other respects be sustained. We do

not, however, understand this principle to go so far as to warrant the sustaining of a contract when that which is illegal in it is the consideration itself; and the contention in this instance must go to that extent, or it will fail to meet the requirements of the case. The answer to it will then be, that a contract whose consideration is immoral or otherwise illegal and therefore void, is itself void, because it then lacks one of the necessary requisites to any legal validity whatever.

"It must further be conceded that to enforce the contract according to the views of complainant would be in effect to make a new contract for the parties, very essentially different from the one to which they gave assent. It would not only give to the Union Pacific a competitor upon its own tracks, but it would force the respondent into a competition to which it never gave assent, and which might, perhaps, be altogether undesirable and unprofitable. *We do not think we have any power to make any such contract for the parties: they must make their own contracts, and when made the contracts must either be valid in their essential provisions, or they must be altogether void. Courts or other tribunals can not remodel and then enforce them, especially when if so remodeled it is obvious the parties themselves would not have made them.*

"Either therefore this proviso which attempts to preclude the respondent from accepting traffic between Kansas City and Topeka must stand, or the whole contract must be held void. Complainant does not attack the contract as a whole, but concedes that it gives to the respondent rights of

trackage, and contends that it not only imposes upon respondent duties and obligations to the full extent contemplated by the parties in making it, but also further duties and obligations under the laws of the state and of the nation. This view, for the reason already given, we cannot accept * * *." (Emphasis supplied.)

Hocking Domestic Coal Co. v. *K. & M. Ry. Co.*, 44 I.C.C. 392, is another instance in which the Commission upheld the validity of a trackage agreement. This was the same trackage agreement as that involved in *K. & M. Ry. Co.* v. *The Public Utilities Commission of Ohio*, 96 Oh. St. 414, which was upheld by the Supreme Court of that state. At page 399 of its report (44 I.C.C. 392), the Commission said:

"Another contention strongly urged by counsel for the complainant is that the reservation by the Hocking Valley to itself of the exclusive use of the private switch tracks hereinbefore mentioned is void and against public policy. * * * It is, of course, the well-settled law that a railroad may not render itself incapable of performing its duties to the public or absolve itself from those obligations without the consent of the state. It will serve no useful purpose, however, to enter upon any discussion of the cases. It will suffice to say that the authorities clearly establish the doctrine that an owning and operating railroad may give trackage rights to another carrier over a part of its line, where such a grant does not impair the performance of its own duties to the public as a common carrier, and, in the absence of a controlling statute, *that the*

owning carrier may, by the terms of the agreement, prohibit the grantee from exercising its functions as a common carrier with respect to traffic upon the line of track so granted. Such provisions do not impair the common-carrier obligations of the grantee on its own line, and the grant may indeed enlarge the ability of the grantee carrier to serve patrons on its own line. The general principles will be found stated at some length in *Union Pacific Ry. Co.* v. *Chicago, etc., Ry. Co.*, 163 U. S. 564, 593, 594, 595. Speaking of a similar limitation in *Alford* v. *C., R. I. & P. Ry. Co.*, 3 I. C. C. 519, 531, this Commission said that the rights of the lessee with respect to the leased line 'are not the general rights of a common carrier upon its own road, but are limited and qualified by the agreement. They are simple contract rights which the law does not and can not enlarge.'" (Emphasis supplied.)

Other decisions of the Commission sustaining the validity of trackage agreements are summarized in the footnote.[36]

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[36] *Chicago, M., St. P. and P. R. Co. Trustees Operation*, 247 I. C. C. 1, 7 (decided after the passage of the Transportation Act of 1940 conferring specific authority upon the Commission to approve certain types of agreements between carriers by virtue of Section 5(2) of the Act. The Commission pointed out that other trackage agreements between carriers could still be made without its approval); *Texas & N. O. R. Co. Operation*, 249 I. C. C. 595; *Abandonment by Chicago, Rock Island and Pacific Ry. Co.*, 131 I. C. C. 421. (in the last two cases the Commission held that it was not empowered under Section 1(18) of the Act to authorize the abandonment by a carrier of its mere contractual right to operate over the railroad of another carrier: *"We have no jurisdiction over the contractual right of one carrier to operate over the road of*

In view of the foregoing authorities, there can be no doubt that the Commission erred in assuming authority to hold the trackage agreement between the Stock Yards and the New York Central respecting the use of Track 1619 valid insofar as it granted a use to the railroad, but invalid insofar as it restricted the type of use permitted. The Commission had no authority whatever under the circumstances. The trackage agreement between the common carrier and the non-carrier in this case was beneficial to all persons concerned, particularly so in the case of Swift & Company, which arranged for the plan under which Track 1619 was utilized, beginning in 1910, with knowledge that such track was not used for livestock purposes. It ill-behooves one who has thus reaped the benefit of an arrangement for over a quarter of a century to claim that such arrangement is partially invalid because he now finds that it would

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another carrier, except as such right is exercised in the operation of the road." (131 I. C. C. 421, at p. 429, Emphasis supplied); *Merchants Refrigerating Co.* v. *New York Central R. R. Co.*, 238 I. C. C. 599 (in this case the carrier had rented a spur track to a non-carrier. The Commission said, at page 604, "This is an arrangement to connect defendant's line with complainant's private siding and to provide for the continuance and upkeep of the spur track. It is not a contract for transportation itself, or for the movement of particular shipments. The rent is payable even if no shipments are made. It is beyond the jurisdiction of this Commission. *Ziegler Bros.* v. *Southern Ry. Co.*, 157 I. C. C. 660. ***"); *Missouri-Kansas-Texas R. R. Co.* v. *K. C. T. Ry. Co.*, 104 I. C. C. 203 (upheld contract made by carriers for use of terminal facilities. See particularly discussion on pages 222 *et seq.* The decision of the Commission was subsequently affirmed in *United States* v. *Interstate Commerce Commission*, 71 F. (2d) 336, and *United States ex rel. Chicago, etc.* v. *Interstate Commerce Commission*, 294 U. S. 50).

be desirable to have a different arrangement than the one actually made.

The New York Central and the other carriers who are appellees in this action have not been disabled by virtue of the contractual arrangement from performing any of the duties imposed upon them by the Interstate Commerce Act, as amended, with respect to the lines they control. They have no power to perform the duties presently sought to be imposed upon them by the appellants. *Alford* v. *Chicago, Rock Island and Pacific Ry. Co.*, 3 I.C.C. 519, 532-533. The trackage agreement has enabled Swift & Company, as well as a number of other industries, to have the means of securing supplies and making shipments in and out of their plants of every type of commodity except livestock for over three decades without the necessity of going to the expense of constructing a track of their own. The bald situation is here presented of a party which for years has reaped the benefit of this arrangement now seeking to disrupt that arrangement because it would be convenient for present purposes to do so.

III

THE COMMISSION'S ORDER IS INVALID

The order of the Commission of May 3, 1946 (R. 64-65) is clearly invalid as to the Stock Yards, both because the Stock Yards has done nothing to impair its right to limit the use of Track 1619 to such transportation thereon as does not interfere with its own business and because the Commission is, in no event, empowered to limit the Stock Yards' control over use of Track 1619. In spite of this, the Commission ordered both the

common carriers by rail and the Stock Yards to cease, and to desist and to abstain from, refusing to deliver interstate shipments of livestock to the sidetrack of Swift & Company at Cleveland, Ohio, and to establish and maintain in force a schedule providing for such deliveries of livestock.

Both the Stock Yards and the carriers are at a loss to determine how to comply with such an order. The Stock Yards cannot abstain from refusing to deliver livestock to Swift & Company. It is equally impossible for the Stock Yards to perform the second command of the Commission's order, namely, to establish a schedule for the delivery of livestock to Swift & Company's siding by filing a tariff with the Commission. The Stock Yards is not engaged in transportation, owns no trains, and has never held itself out to the public as having facilities to transport passengers or property over Track 1619.

On the other hand, the common carriers by rail are also confronted with a grave problem insofar as compliance with the Commission's order is concerned. There is no contention in this connection that the Commission, as an abstract matter, lacks jurisdiction over the persons of the common carriers. But the jurisdiction of the Commission, even with respect to such common carriers, is not such as to confer upon the Commission authority to compel the common carriers to perform some act which is *physically* or *legally* impossible for them to carry out. The carriers are under no duty to perform that which they have no power to perform. The only right which the carriers have to operate over Track 1619 is that conferred upon them by virtue of the trackage agreement between

the New York Central and the Stock Yards. This contract is a mere agreement for restricted running arrangements subject to the conditions heretofore pointed out. *Union Pacific Ry.* v. *Chicago, etc., Ry.*, 163 U.S. 564, 583. If the railroads were to attempt to operate over this track in violation of such contractual limitations, they would subject themselves to liability for damages, to suits for injunctions, and to possessory actions. *Secombe* v. *Milwaukee, etc., R. Co.*, 23 Wall. 108, 118; *Salt Lake City* v. *Hollister*, 118 U.S. 256, 260; *United States* v. *Lynah*, 188 U.S. 445, 467; *Northern Pacific R.R.* v. *Smith*, 171 U.S. 260, 271; *Roberts* v. *Northern Pacific R.R.*, 158 U.S. 1, 11; *Osborne* v. *Missouri Pacific Ry.*, 147 U.S. 248, 258; *Bass* v. *Metropolitan West Side Electric R.R.*, 82 Fed. 857; and *Wagner* v. *Railway*, 38 Oh. St. 32. All of these remedies would be available to the Stock Yards in the case at bar, including even the possessory actions (ejectment or trespass), because, unlike the situation in *Northern Pacific R.R.* v. *Smith*, 171 U.S. 260, and *Roberts* v. *Northern Pacific R.R.*, 158 U.S. 1, the record in the case at bar does not present a situation in which a landowner permitted a railroad company *without objection* to take possession of his land, construct a track and operate the road.

In the brief filed on behalf of the Government, it appears to be conceded that the carriers would subject themselves to legal action at the suit of the Stock Yards in the event they were to try to move livestock over Track 1619. The appellants are correct in this concession, but if the carriers would subject themselves to such legal action, as undoubtedly they would, it is because they would

be committing a legal wrong against the Stock Yards by so operating over Track 1619. In short, they have no legal right to operate over such track for such purpose. Thus, the Government has failed to pursue to its ultimate conclusion the logic of its concession regarding remedies.

The Interstate Commerce Commission itself has heretofore taken the position that a carrier is not guilty of a violation of the Interstate Commerce Act, as amended, in failing to operate over industrial sidetracks where *legal* or *physical* obstructions prevent such operation and that the Commission will not order such operation under these circumstances. Thus, in *Limits Industrial Building Corporation et al.* v. *B. & O. Co.*, 258 I.C.C. 438, 441, the Commission stated that:

> "* * * Common-carrier services over private sidings and private industrial tracks cannot be expected and certainly cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevents it from entering upon those tracks. Nor is it within our jurisdiction to order a carrier or any other party, to take steps to remove such obstructions."

Other decisions of the Commission holding that service over private tracks by common carriers cannot be compelled under the Act are *Rex Jellico Coal Co. et al.* v. *Louisville and Nashville Ry. Co.*, 237 I.C.C. 67, 70-71; *Winnsboro Granite Corporation* v. *Southern Ry. Co.*, 176 I.C.C. 481; *Alexander King Stone Co.* v. *Chicago, I. & L. Ry. Co.*, 160 I.C.C. 245, 257; and *Certain-Teed Products Corp.* v. *C., R. I. & P. Ry. Co. et al.*, 68 I.C.C. 260, 262.

The report of the Commission is confusing and was accompanied by no separate findings of fact.[37] The confusion is compounded in the brief filed on behalf of the Government (pp. 64 *et seq.*), where the amazing position is taken that the Commission's order does not "necessarily involve the use of Track 1619" or require action on the part of the Stock Yards. It was with the sole object of securing such use that the proceeding was instituted by Swift & Company before the Commission. It was the point discussed and argued before the Commission and before the court below. It is hard to comprehend how appellants can now contend that the Commission's order does not involve Track 1619 or the Stock Yards. If such is the case, why was the Stock Yards ever brought into this proceeding? At all events, it cannot be de-

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[37] This Court has frequently said that it will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for an order. *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193. In the absence of a finding of essential basic facts, of course, an order cannot be sustained. *Florida* v. *United States*, 282 U. S. 194, 215. The Court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433. See *Beaumont S. L. and W. Ry.* v. *United States*, 282 U. S. 74, 86; *Interstate Commerce Commission* v. *Chicago, Burlington and Quincy Ry. Co.*, 186 U. S. 320, 341. In view of the frequent expressions of this Court as to the necessity of findings of some sort by administrative agencies, such as the Interstate Commerce Commission, it appears that the order in the case at bar—particularly in view of the impossible nature of the order as applied to the two classes of appellees apparent from the face thereof—would be invalid on the ground of lack of adequate findings alone.

nied in good faith that the Commission had in mind Track 1619 when it made its order.

Equally untenable is the Government's argument in its brief (p. 36) to the effect that considerations of ownership of and contractual limitations on the right to use Track 1619 are as irrelevant as questions relative to mortgages and reorganization proceedings with respect to other portions of the lines of the common carrier appellees. Whatever those mortgages and reorganization proceedings referred to may be, it appears that the common carrier appellees have the legal *control* and, consequently the *right* to operate over such lines. Thus, there is a basis upon which a duty can be predicated. But this is not true with respect to Track 1619, where no legal right is given to the carriers with respect to the movement of livestock and where, consequently, no power or duty attaches.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the order of the Commission of May 3, 1946, was unlawful and that the final order and judgment of the court below of May 14, 1947, should be affirmed.

Respectfully submitted,

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Counsel for Appellee, The Cleveland Union Stock Yards Company.

January 27, 1948.

APPENDIX A

PERTINENT STATUTORY PROVISIONS

(Supplementing those appearing in Appendix A of the Government's Brief)

1. INTERSTATE COMMERCE ACT, AS AMENDED, PART I (49 U. S. C. 1 ET SEQ.)

SEC. 1. * * *

* * *

(7) No common carrier subject to the provisions of this part shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled

Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this part: *Provided further*, That the term "employees" as used in this

paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars or more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

(8) From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other

than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

* * *

(14) (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for non-observance of such rules, regulations, or practices.

(b) It shall be unlawful for any common carrier by railroad or express company, subject to this part, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just,

reasonable, and consistent with the public interest: *Provided*, That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941.

* * *

SEC. 3. * * *

* * *

(5) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal

facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

* * *

SEC. 5. * * *

* * *

(2) (a) It shall be lawful with the approval and authorization of the Commission, as provided in sub-division (b)——

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such car-

rier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * *

SEC. 6 (1). That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the

public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

2. SECTIONS 1, 2, AND 3 OF THE ELKINS ACT (49 U. S. C. 41, 42, AND 43)

SEC. 41 (1). Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit,

accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of chapter 1 of this title, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either

jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of chapter 1 of this title or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42, or 43 of this title, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset

against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

SEC. 42. In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate,

regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

SEC. 43. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations, forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed, or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against

the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. And in proceedings under said sections and chapter 1 of this title the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1947.

The United States of America, Interstate Commerce Commission and Swift & Company, Appellants, v. The Baltimore and Ohio Railroad Company, et al.	Appeal from the District Court of the United States for the Northern District of Ohio.

[March 8, 1948.]

Mr. Justice Black delivered the opinion of the Court.

This case is properly here on appeal from a District Court decree enjoining enforcement of a cease and desist order of the Interstate Commerce Commission. 28 U. S. C. § 345; 71 F. Supp. 499. The order enjoined required the five railroad appellees [1] to abstain from refusing to deliver interstate shipments of livestock to the sidetrack of Swift & Company's packing plant at Cleveland, Ohio, and to establish tariffs for such deliveries. Swift's sidetrack has only one connection with a railroad. That connection is with the main line of the New York Central by way of a spur track, known as "Spur No. 245," operated by that railroad. One end of this spur owned by the New York Central connects with its main line; the other end of the spur, also owned by the railroad, connects with Swift's sidetrack and with other private sidetracks. A 1619-foot middle segment of the spur, known as "Track 1619," is owned by the Cleveland Union Stock Yards Company. Under the terms of a trackage agreement with Stock Yards, New York Central uses Track 1619 for deliveries to Swift's sidetrack and other private

[1] The railroad appellees are Baltimore & Ohio Railroad Company, the Erie Railroad Company, the Wheeling & Lake Erie Railroad Company, the New York Central Railroad Company, and the Pennsylvania Railroad Company.

sidetracks connected with Spur No. 245. Thus all interstate railroad shipments to Swift's siding and to others similarly located can be made only over the segment of track owned by Stock Yards. Because of its interest in Track 1619, Stock Yards was made a party to the proceedings before the Commission and was included in its cease and desist order along with the railroads.[2] So long as Stock Yards continues to own Track 1619, delivery of livestock and other freight by New York Central to Swift and others similarly located depends upon whether and to what extent Stock Yards will grant or has granted New York Central a right to operate over Track 1619. This present case involves the question of whether the railroads, and particularly New York Central, in making deliveries of livestock over Track 1619 to Swifts's sidetrack must comply with certain conditions imposed by Stock Yards in its present agreement with New York Central.

Track 1619 was constructed in 1899 on Stock Yards' property by Stock Yards and New York Central's predecessor in interest. A contemporaneous written agreement, cancellable on 60-days written notice by the railroad, gave the railroad a right to use the track for railroad purposes, provided the use did not interfere with Stock Yards' business. In 1910, after negotiations with the railroad, Swift built its sidetrack, and the railroad extended its Spur No. 245 by a track which connected Track

[2] Appellees argue that Stock Yards was improperly made a party and that the Commission was without power to include Stock Yards in its cease and desist order. We think § 2 of the Elkins Act, 32 Stat. 848, 49 U. S. C. § 42, justified the Commission's action and find no merit to the contention that we should by interpretation restrict that section's broad language authorizing inclusion as parties of "all persons interested in or affected by the rate, regulation or practice under consideration" by the Commission or by a court, and which provides that decrees may be made with reference to such additional parties to the same extent as though they were carriers.

1619 with Swift's siding. The 1899 written trackage agreement was superseded by another in 1924. This one was cancellable by either party on 30-days written notice. It provided that the railroad should maintain the tracks at its own expense, and it granted to the railroad "the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land." From 1910, when Swift's siding was constructed, to 1924, and for many years thereafter, the railroad continued to deliver all kinds of commodities to Swift and to other packers likewise served only by way of Spur No. 245 and Track 1619.

In the early 1930's Stock Yards concluded that it was losing patronage and fees because of delivery of livestock to Swift at its siding. A large source of Stock Yard's income comes from fees it charges for unloading and delivering interstate shipments of livestock to pens within its yard. Stock carried over Track 1619 to Swift's siding and to other private sidings are unloaded at those sidings; as a result Stock Yards loses the fees it would receive if livestock consigned to Swift and to other packers were unloaded at the Stock Yards. With a view toward collecting unloading fees from Swift and other packers served by Spur No. 245, Stock Yards instituted negotiations with the New York Central which in 1935 resulted in a modification of their 1924 agreement. The old 1924 agreement had unconditionally granted "Railroad, the free and uninterrupted use of any and all tracks . . . ." The 1935 modified agreement also granted New York Central "the free and uninterrupted use," of Stock Yard's tracks but added, "except for competitive traffic a charge for which use shall be the subject of a separate agreement."

After this 1935 restrictive modification Stock Yards demanded that the railroad adopt one of two courses with regard to livestock, which the parties agreed was the "competitive traffic" the modified agreement was designed

to suppress. The railroad must either stop carrying livestock over Track 1619 to Swift and other packers, or pay Stock Yards, for use of Track 1619 in carrying livestock to these packers, amounts equivalent to fees Stock Yards would have collected had the livestock consigned to them been unloaded and delivered in the yard. This amount was considered exorbitant by New York Central and the other railroads for whom New York Central performed switching charges, and they therefore refused to pay it. The result was that in 1938 the railroads ceased delivering livestock to the sidings of Swift and other packers served by Spur No. 245,[3] although they have under agreement with Stock Yards continued to use the spur for delivery of all other kinds of commodity shipments to these sidings. Swift demanded that the railroads deliver livestock to its siding, and in 1941 filed a complaint with the Interstate Commerce Commission upon their refusal to make deliveries.

After notice and hearing the Commission concluded that the railroad's refusal to carry livestock to Swift violated several provisions of the Interstate Commerce Act. It was found to violate § 3 (1) because of the discrimination against a single commodity, livestock, and because New York Central's deliveries of livestock to the sidetracks of some of Swift's nearby competitors, whose sidings were served without using Track 1619, subjected Swift to undue prejudice and gave those competitors an undue preference. The Commission also found that the

[3] In 1938 New York Central ceased to switch livestock carloads of other carriers over Spur No. 245 to Swift's siding, and it canceled its tariffs for this service. Since that time there has been no specific tariff authority for movement of livestock to Swift's siding when shipped to Cleveland over lines other than the New York Central. Although New York Central has never canceled its tariff for livestock shipments to Swift's Cleveland siding from points of origin on its own lines, it has delivered all livestock consigned to Swift's siding to Stock Yards since 1938. Swift has been forced to pay charges to Stock Yards to obtain possession of livestock unloaded at the yards.

failure to deliver under the circumstances shown was a violation of § 1 (6) which forbids unreasonable practices affecting the manner and method of delivering freight, and also a violation of § 1 (9) which requires railroads to operate switch connections with private side tracks without discrimination under such conditions as the Commission found to exist here.

The Commission's findings of fact are not challenged. There can be no doubt that those facts found would constitute a violation of the sections referred to if Spur No. 245 were wholly owned by the railroad. Ownership of Track 1619 by Stock Yards and its objection to livestock deliveries is, in fact, the only reason suggested for the railroads' failure to deliver shipments of livestock to Swift as they do to neighboring packers, and for their failure to provide switching connections for livestock shipments. From what has been said our question is this: Can the non-carrier owner of a segment of railroad track who contracts for an interstate railroad's use of the segment as part of its line reserve a right to regulate the type of commodities that the railroad may transport over the segment, or would such a reservation be invalid under the Interstate Commerce Act?

The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types, *New York* v. *United States*, 331 U. S. 284, 296, and language of the broadest scope has been used to accomplish all the purposes of the Act. *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, 616. It would be strange had this legislation left a way open whereby carriers could engage in discriminations merely by entering into contracts for the use of trackage. In fact this Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices

could not be frustrated by contracts, even though the contracts were executed before enactment of the legislation. See *Philadelphia, Balt. & Wash. R. Co.* v. *Schubert*, 224 U. S. 603, 613–614; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 483, 485–86.

We think the provisions of the Interstate Commerce Act plainly empowered the Commission to enter this order against the discriminatory practices found, despite ownership of Track 1619 by Stock Yards. Section 1 (1) (a) makes the Interstate Commerce Act applicable to common carriers "wholly by railroad." Section 1 (3) (a) defines the term "railroad" as including "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease and also all switches, spurs, tracks. . . ." As one of the many other indications that Congress did not intend its railroad regulatory provisions to depend on who had legal title to transportation instruments, § 1 (3) (a) also provides that the word "transportation" as used in the Act shall broadly include "locomotives . . . and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof . . . ." It is true, as appellees argue, that the above language of § 1 (3) (a) is definitional only. *Ellis* v. *Interstate Commerce Comm'n*, 237 U. S. 434. But it is also true that these definitions by their unambiguous language, make all trackage "in use by any common carrier" subject to the regulatory provisions of the Act, even though not owned by the carrier, but only used by it under a contract or agreement. Thus Track 1619, though owned by Stock Yards, was subject to the Act because of its use by the New York Central under trackage agreements.

It is just as prejudicial to shippers and the public for a railroad that uses a portion of track under lease or contract to discriminate, as it is for the discrimination

to be inflicted by a railroad that owns its entire track. Practically the only argument suggested to justify discriminatory practices under the circumstances here is that an owner has a right to let others use his land subject to whatsoever conditions the owner chooses to impose. It is even argued that to construe the Interstate Commerce Act as limiting that right would result in depriving an owner of his property without due process of law. But no such broad generalization can be accepted. Property can be used even by its owner only in accordance with law, and conditions its owner places on its use by another are subject to like limitations. Of course it does not deprive an owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve.

Here Congress under its constitutional authority has provided that no railroad shall engage in certain types of discriminatory conduct in violation of three provisions of the Act. The Commission found that discriminatory conduct here. The excuse offered by the railroads is that the owner of Track 1619 required them to do the prohibited things. But the command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination.

We hold that the Commission's order was authorized by statute and that it does not deprive Stock Yards of its property without due process of law. In doing so we do not pass upon any questions in relation to the dedication of Track 1619 to railroad use. Neither do we decide what are the relative financial rights of Stock Yards and New York Central under their contracts, nor whether Stock Yards can cancel the contract with New York Central, nor what would be the duty of New York

Central should Stock Yards attempt to terminate its right to use Track 1619. We only hold that Stock Yards' ownership of Track 1619 does not vest it with power to compel the railroads to operate in a way which violates the Interstate Commerce Act.

The Commission's order is valid and should be enforced.

Reversed.

MR. JUSTICE BURTON, dissenting.

For the reasons stated in the opinion of the District Court in this case, 71 F. Supp. 499, I believe that the order of the Interstate Commerce Commission exceeded its jurisdiction and that the judgment permanently enjoining the enforcement of such order should have been affirmed.